89-2025

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

FIREMAN'S INSURANCE COMPANY AND D.H. BLATTNER & SONS, INC., Petitioners,

v.

ARKANSAS STATE CLAIMS COMMISSION AND ARKANSAS STATE HIGHWAY AND TRANSPORTATION DEPARTMENT, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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June 25, 1990

QUESTIONS PRESENTED

The Arkansas procedures for deciding claims against the State provide that (a) a claimant must file a claim with the State Claims Commission, which is an investigative arm of the Arkansas General Assembly; (b) the Claims Commission need not give any meaningful reasons for its decisions; (c) an appeal from a Claims Commission decision may be taken only to the General Assembly; (d) there are no published procedures for an appeal to the General Assembly or for the General Assembly's consideration of an appeal; (e) the General Assembly has total discretion to reject any Claims Commission decision which awards more than $2,000; and (f) the General Assembly need not give any reasons for its orders regarding Claims Commission decisions.

The questions presented are:

1. Do the Arkansas procedures for deciding claims against the State violate the due process clause of the Fourteenth Amendment because no adequate post-deprivation remedies are provided to claimants?

2. Do the Arkansas procedures for deciding claims against the State violate the due process clause of the Fourteenth Amendment because fundamental fairness is not provided to claimants?

LIST OF PARTIES AND RULE 29.1 LIST

The parties to the proceedings below were petitioners Fireman's Insurance Company and D.H. Blattner & Sons, Inc. as plaintiffs, and respondents Arkansas State Claims Commission and Arkansas State Highway and Transportation Department as defendants.

Fireman's Insurance Company, which is officially known as Fireman's Insurance Company of Newark, New Jersey, is a wholly owned subsidiary of The Continental Corporation of New York, New York. Fireman's Insurance Company has no subsidiary companies.

D.H. Blattner & Sons, Inc. has no parent or subsidiary companies.

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The petitioners Fireman's Insurance Company and D.H. Blattner and Sons, Inc. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Arkansas, entered in the above-titled proceeding on February 26, 1990.

OPINIONS BELOW

The opinion of the Supreme Court of Arkansas is reported at 784 S.W.2d 771 and is reprinted in the Appendix, pages 1-16.

The Orders and Judgments of the Circuit Court of Pulaski County, Arkansas are not reported and are reprinted in the Appendix, pages 17-24. The Order of the Arkansas State Claims Commission is not reported and is reprinted in the Appendix, pages 25-26.

JURISDICTION

On February 26, 1990, the Supreme Court of Arkansas issued its opinion affirming the Orders and Judgments of the Circuit Court of Pulaski County, Arkansas, which dismissed petitioners' Petition for Review and Petition for Writ of Certiorari. On March 26, 1990, the Supreme Court of Arkansas entered its Order denying petitioners' Motion for Rehearing.

The jurisdiction of this Court to review the opinion of the Supreme Court of Arkansas is invoked pursuant to 28 U.S.C. §1257(a). In addition, 28 U.S.C. §2403(b) may be applicable.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT XIV, SECTION I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United

States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ARKANSAS CONSTITUTION ARTICLE 5, §20.

State not made defendant.

The State of Arkansas shall never be made defendant in any of her courts.

ARKANSAS STATE CLAIMS COMMISSION
RULES AND REGULATIONS

FORWARD

The Arkansas Claims Commission has been described as "the conscience of the State of Arkansas." It is a quasi-judicial commission created by the General Assembly

designed to afford relief to individuals who have in some way been injured or damaged by the State of Arkansas. (Page 2)

* * * *

JURISDICTION OF COMMISSION

* * * *

Because the Commission has maintained from its inception that its primary function is to serve as a fact finding body for the General Assembly the Commission's jurisdiction is under the scrutiny of the General Assembly as an administrative quasi-judicial agency. Its findings and legal renderings are not subject to judicial review of any type. (Page 4).

* * * *

APPEAL OF COMMISSION'S DECISION

The only appeal from the Claims Commission is to the Arkansas General Assembly. As an arm of the state legislature, the Commission's findings and deci-

sions are subject only to review by the General Assembly as to awarding monetary damages. A final and binding decision of the Commission can only be appealed to the General Assembly to be reversed, amended or overturned. (Page 4)

APPROVED CLAIMS EXCEEDING $2,000.00

All claims exceeding $2,000.00 approved by the Commission must be submitted to the next regular session of the General Assembly for its approval and subsequent appropriation of funds before payments can be rendered.

On all controversial and noncontroversial claims, when the amount claimed exceeds $2,000.00 the Commission requires any agency supervisory head admitting liability and requesting payment of an uncontested claim to appear in person on behalf of the agency to request payment thereof.

Prior to the convening of the General Assembly, the Director will prepare a Special Claims Bill to be submitted to the Joint Budget Committee and Legislative Counsel for review of the amounts approved and the total number of claims to be paid by legislative enactment.

It shall be the policy of the Commission to keep the Docket current and to make some kind of disposition of all claims filed between each general session of the General Assembly prior to the convening of the next General Assembly.

Disbursement of funds in payment of allowed claims is conditional on the duration of the legislative session. The Commission Director will issue a voucher in payment of the amount allowed to the attorney and claimant jointly, unless specified differently, in satisfaction of all claims requiring legislative approval. (Page 5)

STATEMENT OF THE CASE

A. Procedural History of This Case

Fireman's Insurance Company provided surety bonds to the Arkansas State Highway and Transportation Department for projects in Benton County, Arkansas. Following the default of the original contractors, Fireman's Insurance Company retained D.H. Blattner & Sons, Inc. to complete the projects. (Tr. 73-77)[1] During the completing construction work, Fireman's and Blattner had disputes with the Highway Department, and Fireman's and Blattner ultimately filed a Complaint with the Arkansas State Claims

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[1]All citations to the Transcript refer to the Transcript of the hearing held before the Arkansas State Claims Commission on September 12, 1988, which is part of the record in the Supreme Court of Arkansas, Case No. 89-245. All citations to the "Arkansas Appendix" refer to the Appendix filed in the Supreme Court of Arkansas, Case No. 89-245. The Appendix filed in this Court will be designated as "Appendix".

Commission on November 12, 1987. (Arkansas Appendix, pages 26-30). In this Complaint, Fireman's and Blattner alleged that they sustained damages in excess of one million dollars as a result of the breaches of contract, ex contractu breaches of warranty, negligence and interferences by representatives of the Highway Department. (Arkansas Appendix, pages 26-30).

The Arkansas State Claims Commission held a hearing on this Complaint on September 12, 1988. (Tr. 1) The Claims Commission issued its Order on October 20, 1988, stating that "(t)he Commission unanimously finds that Claimant failed to prove any improper action on the part of Arkansas State Highway Department. Therefore this claim is unanimously denied and dismissed." (Appendix, pages 25-26) The Claims Commission's Order contains no findings of fact or conclusions of law, apart from

those two sentences. (Appendix, pages 25-26).

Fireman's and Blattner filed a Petition for Review of the Claims Commission's Order on November 18, 1988 in the Circuit Court of Pulaski County, Arkansas, Case No. CV88-7241, seeking judicial review of the Claims Commission's Order under the Arkansas Administrative Procedure Act. (Arkansas Appendix, pages 19-25). Fireman's and Blattner alleged that the Claims Commission's actions violated their constitutional rights to due process. (Appendix, pages 76-80).

Fireman's and Blattner also filed a Petition for Writ of Certiorari on November 21, 1988 in the Circuit Court of Pulaski County, Arkansas, Case No. CV88-7251, seeking judicial review of the Claims Commission's Order under the Arkansas certiorari procedure. (Arkansas Appendix, pages 1-

6). Fireman's and Blattner alleged that the Claims Commission's actions violated their constitutional rights to due process. (Appendix, pages 81-84).

The Claims Commission and Highway and Transportation Department filed identical Motions to Dismiss both Petitions. (Arkansas Appendix, pages 15-18, 34-37). The Circuit Court issued its Orders and Judgments on May 15, 1989, granting all of the Motions to Dismiss. (Appendix, pages 17-24).

Fireman's and Blattner appealed to the Supreme Court of Arkansas, which issued its opinion affirming the Circuit Court's Orders and Judgments on February 26, 1990. (Appendix, pages 1-16). In this decision, reported at 784 S.W.2d 771, the Supreme Court of Arkansas rejected the due process arguments raised by Fireman's and Blattner. 784 S.W.2d 771, 775. (Appendix,

pages 12-16).

Fireman's and Blattner filed a Petition for Rehearing of the opinion of the Supreme Court of Arkansas. (Appendix, pages 53-61). The Court denied this Petition on March 26, 1990. (Appendix, page 27).

B. Facts Regarding Arkansas Claims System

All claims against the State of Arkansas must be filed with the State Claims Commission because of the sovereign immunity provision of Article 5, Section 20 of the Arkansas Constitution. (Opinion of Supreme Court of Arkansas, 784 S.W.2d 771, 773-774; Appendix, pages 3-8). The Claims Commission is not an independent agency, but instead is "an arm" and a "fact-finding body" of the Arkansas General Assembly. (Opinion of Supreme Court of Arkansas, 784 S.W.2d 771, 775; Appendix, pages 13, 15; Jurisdiction of Commission and Appeal of

Commission's Decision sections of the Claims Commission's Rules and Regulations, page 5-6 of this Petition).

The Claims Commission need not provide any reasons for its decisions in the absence of any requirements in any Arkansas statutes or in the Claims Commission's Rules and Regulations. (Arkansas Appendix, pages 39-53).

If the Claims Commission denies a claim, the only right of appeal is to the General Assembly, not to a Court. (Opinion of Supreme Court of Arkansas, 784 S.W.2d 771, 774-775; Appendix, pages 12, 15; Jurisdiction of Commission section of Claims Commission's Rules and Regulations, pages 5-6 of this Petition).

If the Claims Commission approves a claim in excess of $2,000, the General Assembly has total discretion as to whether the claim will be paid or not. (Approved

Claims Exceeding $2,000 section of Claims Commission's Rules and Regulations, pages 6-8 of this Petition).

There are no published procedures for an appeal to the General Assembly, for the General Assembly's consideration of an appeal or for the content of the General Assembly's decisions regarding an appeal, in any Arkansas statutes, in the Claims Commission's Rules and Regulations, or in any other source made known to claimants. (Arkansas Appendix, pages 39-53).

The record in the Arkansas Supreme Court, Case No. 89-245, contains examples of the Arkansas General Assembly's interference in decisions and membership of the Claims Commission for political ends. (Appendix, pages 39-40; Arkansas Appendix, pages 128, 140-150).

C. How The Federal Questions Were Presented

The Supreme Court of Arkansas rejected the due process arguments raised by Fireman's and Blattner, holding that Arkansas provides adequate post-deprivation procedures though the Claims Commission process. 784 S.W.2d 771, 775 (Appendix, pages 12-16).

Fireman's and Blattner raised the issue that the opinion of the Supreme Court of Arkansas was contrary to the due process clause of the Fourteenth Amendment in their Petition for Rehearing and Brief in Support of Petition for Rehearing (Appendix, pages 53-61). Fireman's and Blattner argued that the Claims Commission's Order and the Arkansas claims process violate the due process clause of the Fourteenth Amendment in their Brief to the Supreme Court of Arkansas (Appendix, pages 28-46); in their

Reply Brief to the Supreme Court of Arkansas (Appendix, pages 47-52); and in their Brief in Response to defendants' Motions to Dismiss, filed in the Circuit Court (Appendix, pages 62-75). Fireman's and Blattner stated that the Claims Commission's procedures violated due process requirements in their Petition for Review and their Petition for Writ of Certiorari filed in the Circuit Court. (Appendix, pages 76-84).

REASONS FOR GRANTING THE WRIT

I. The Supreme Court of Arkansas' holding that the Arkansas claims system does not violate the due process clause of the Fourteenth Amendment (a) conflicts with decisions of this Court, the Eighth Circuit Court of Appeals and other Courts, and (b) leaves claimants with inadequate post-deprivation remedies.

The Supreme Court of Arkansas' holding that the Arkansas system for deciding claims against the State does not violate the due process clause of the Fourteenth Amendment leaves claimants with inadequate post-deprivation remedies. Claimants are now at the mercy of the Arkansas legislature, which has total discretion to decide claims as it sees fit.

The Supreme Court of Arkansas' holding is in conflict with several decisions which indicate that the adequate post-deprivation

remedies required for due process pursuant to Parratt v. Taylor, 451 U.S. 527 (1981) are not provided under such a system, including Birkenholz v. Sluyter, 857 F.2d 1214, 1217-1218 (8th Cir. 1988); Bumgarner v. Bloodworth, 738 F.2d 966, 968 (8th Cir. 1984); Lambert v. McFarland, 612 F.Supp. 1252, 1267-1268 (N.D. Ga. 1984); and Hight v. Burden, 350 S.E.2d 471, 472-473 (Ga. App. 1986).

The Arkansas procedure for deciding claims against the State provides no possibility for review by an independent body, such as a Court, at any stage. As set forth in Section B of the Statement of the Case, all claims against the State must be filed with the Claims Commission because of the sovereign immunity provision of Article 5, Section 20 of the Arkansas Constitution. The Claims Commission is merely "an arm" and "a fact-finding body" of the

Arkansas General Assembly. If the Claims Commission denies a claim for any reason, the only right of appeal is to the Arkansas General Assembly.

If the Claims Commission approves a claim in excess of $2,000, the General Assembly has total discretion as to whether the claim will be paid or not, and disbursement of funds in payment of claims is conditioned on the duration of the General Assembly's session. Bumgarner v. Bloodworth, 738 F.2d 966, 968 (8th Cir. 1984).

The Claims Commission has no published procedures for the content of its decisions and need not give any meaningful reasons for its decisions. There are no published procedures for an appeal of a Claims Commission's decision to the General Assembly. There are no published procedures for the consideration of an appeal by

the General Assembly, and the General Assembly does not have to provide any reasons for its decisions. It is public knowledge that the General Assembly interferes with the Claims Commission's decisions and membership for purely political ends. (Appendix, pages 39-40; Arkansas Appendix, pages 128, 140-150).

This system does not provide adequate post-deprivation remedies as no meaningful hearing is provided and the entire process lacks procedural safeguards which could insure fairness and independence in the decision-making process.

The general unfairness of the Arkansas Claims system is vividly illustrated by this case, in which Fireman's and Blattner filed a claim with the Arkansas State Claims Commission, which denied their claim in a two sentence Order which did not have anything to do with the legal theories pled

by Fireman's and Blattner in their claim, and which did not contain any meaningful findings of fact or conclusions of law. (Appendix, pages 25-26). Pursuant to the opinion of the Supreme Court of Arkansas, Fireman's and Blattner have no right to review of this perfunctory, inexplicable decision by any Court or other independent body.

Georgia had a claims system which was similar to the Arkansas Claims Commission system, as a claim made against the State was limited by statute to a claim filed with a State Board, whose decisions were subject to review only by the state legislature. No judicial review was provided, based on the sovereign immunity provisions of the Georgia constitution. The Georgia system was held to violate the due process requirements of the Fourteenth Amendment to the United States Constitution in Lambert

v. McFarland, 612 F.Supp. 1252, 1267-1268 (N.D. Ga. 1984) and Hight v. Burden, 350 S.E.2d 471, 472-473 (Ga. App. 1986). The Courts in Lambert and Hight held that such a system did not provide adequate post-deprivation remedies for due process purposes as required by Parratt v. Taylor, 451 U.S. 527 (1981).

The Eighth Circuit Court of Appeals stated in Birkenholz v. Sluyter, 857 F.2d 1214, 1217-1218 (8th Cir. 1988) that adequate post-deprivation remedies for due process purposes under Parratt v. Taylor were provided when the State statutes authorized a de novo post-deprivation evidentiary hearing before a Circuit Court, to review the validity of an State agency decision. As Arkansas does not provide for any judicial review of a decision by the Claims Commission, the Arkansas system is inconsistent with the Eighth Circuit's

statements in Birkenholz.

In Bumgarner v. Bloodworth, 738 F.2d 966 (8th Cir. 1984), the Eighth Circuit Court of Appeals held that a due process claim would not be subject to dismissal. The Court rejected the argument that Arkansas provides adequate post-deprivation remedies stating that the Arkansas General Assembly must approve Claims Commission awards in excess of two thousand dollars, and payment of such funds is conditioned on appropriation of funds by the legislature. Id., at 968.

Professor Rodney A. Smolla, in his article Politics and Due Process Don't Mix: Should the State Claims Commission Be Abolished? 1986 Ark. L. Notes 43 (1986) concluded that the Arkansas claims procedure provides no due process, no legal remedies and only "the opportunity to petition the legislature for mercy, dispersed

by its agent, the Commission." (Appendix, pages 40-41, 43-46, 69-74; quoted material on page 70).

The Supreme Court of Arkansas stated that due process rights were not violated because Fireman's and Blattner did not exhaust their procedural remedies by seeking an appeal to the General Assembly. Seeking review or appeal before the General Assembly is a futile act. There are no published procedures regarding appeals to the General Assembly, or regarding the General Assembly's consideration of appeals. The lack of any published procedures is especially important because it is public knowledge that the General Assembly tampers with the Claims Commission's decisions and membership for purely political ends. (Arkansas Appendix, pages 128, 140-150; Appendix 39-40).

In addition, claimants such as Fireman's and Blattner are not provided with a meaningful opportunity for review by the General Assembly, which meets according to the Arkansas Constitution and statutes only once every two years for sixty days or as the Governor proclaims for extraordinary occasions. Arkansas Constitution, Article 5, Section 5; Ark. Code Ann. §10-2-101; Arkansas Constitution, Article 5, Section 17 (Appendix, pages 56-58). In practical effect, unless a member of the General Assembly takes a strong interest in a claimant and sponsors a bill to have a decision of the Claims Commission reviewed, the General Assembly is not going to consider an appeal from a Claims Commission's decision. Particularly for out-of-state businesses such as Fireman's and Blattner, who have no political ties to any member of the General Assembly, this system effec-

tively prevents review by the General Assembly of the Claims Commission's decision. Exhaustion of administrative remedies is not required to entitle one to judicial review where no genuine opportunity for adequate relief exists, or where an administrative appeal would be futile, such as an appeal to the Arkansas General Assembly in this case. Honig v. Doe, 484 U.S. 305, 326-327 (1988); Barr v. Arkansas Blue Cross and Blue Shield, Inc., 761 S.W.2d 174, 177 (Ark. 1988); Arkla Exploration Company v. Texas Oil & Gas Corp., 734 F.2d 347, 355 (8th Cir. 1984), cert. denied 469 U.S. 1158 (1985).

II. The Supreme Court of Arkansas' holding that the Arkansas claims system does not violate the due process clause of the Fourteenth Amendment leaves claimants without procedures governed by fundamental fairness.

The Arkansas claims system violates due process requirements of fundamental fairness set forth in cases such as Mathews v. Eldridge, 424 U.S. 319 (1976). Claimants are not given the opportunity to be heard "in a meaningful manner" as the Claims Commission is not independent from the General Assembly and need not provide any relevant reasons for its decisions. If a claimant loses before the Claims Commission, the only appeal is to the General Assembly, which has no procedures to govern its review. Even if a claimant prevails before the Claims Commission, the General Assembly may refuse to appropriate funds

for the award without providing any reasons. Thus, the hearing before the Claims Commission is not meaningful and provides no legal remedy, as recognized by Professor Smolla in his article, Politics and Due Process Don't Mix: Should the State Claims Commission Be Abolished? 1986 Ark. L. Notes 43, 50 (Appendix, pages 40-41, 43-46, 69-74). Professor Smolla notes:

> "For if the Commission abuses its power, ignores the evidence, contravenes its own procedural rules, or operates out of irrational whim or caprice, there is nothing that can be done about it, save petitioning the General Assembly. And from the opposite extreme, if the Commission allows the claim, and the legislature out of whim or caprice simply fails to abide by the Commission ruling and refuses to pay the claim, there is absolutely

nothing the citizen can do. (Smolla, at 50; Appendix pages 72-73).

An application of the Mathews v. Eldridge factors will reveal that the Arkansas claims system violates the due process requirements of the Fourteenth Amendment. First, the private interest which will be affected by the official action is the interest of all citizens who may have claims against the State of Arkansas to have the benefit of an independent body, operating under principles of law and fair procedures, to hear their claims in a meaningful manner.

Second, there is a great risk of an erroneous deprivation of such interest through the procedures used. Unless a claimant has a political connection with a member of the Arkansas General Assembly, or is lucky enough to catch the Claims Commission and the General Assembly in a generous

mood, a claimant has no opportunity to prevail on a claim against the State of Arkansas. The probable value of additional or substitute procedures is evident, as review of Claims Commission's decisions by the Courts will provide claimants with an opportunity to be heard by an entity not under the control of the General Assembly, one that operates based on the rule of law and regular, fair procedures.

Finally, the State's interest must be weighed. In this case, presumably the State's interest would lie in the fact that if an independent body such as a Court was involved, valid claims against the State would have to be paid, unlike the present system. This Court rejected the argument that an adverse impact on a State's economy is sufficient to justify a violation of procedural due process in Ake v. Oklahoma, 470 U.S. 68 (1985).

This Court considered the Mathews v. Eldridge analysis in Washington v. Harper, 494 U.S. ___, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990), and held that the State's interests "cannot withstand challenge if there are no procedural safeguards to ensure the prisoner's interests are taken into account." 108 L.Ed.2d 205. This Court held that the State's interest and the need for adequate procedural safeguards were met in Washington because of the "independence of the decisionmaker" which provides a "full and fair hearing". 108 L.Ed.2d 205-206. Such procedural safeguards are utterly lacking in the Arkansas claims procedure.

The Fourteenth Amendment to the United States Constitution is meant to protect all citizens from the type of unbridled power wielded by the General Assembly in the Arkansas claims process. Review by this

Court is essential to curb the abuses of the Arkansas claims process and to bring the law of Arkansas into conformity with other Courts which have considered these due process issues.

CONCLUSION

For these reasons, this Petition for Certiorari should be granted.

Respectfully Submitted,

By _____

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ARKANSAS STATE CLAIMS COMMISSION AND ARKANSAS STATE HIGHWAY AND TRANSPORTATION DEPARTMENT, Respondents.

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SUPREME COURT OF ARKANSAS

No. 89-245

FIREMAN'S INSURANCE CO. & D.H. BLATTNER & SONS, INC.,	Opinion Delivered February 26, 1990
APPELLANTS,	APPEAL FROM THE CIRCUIT COURT, PULASKI COUNTY, SIXTH DIVISION;
vs.	# CIV 88-7251
ARKANSAS STATE CLAIMS COMMISSION AND ARKANSAS STATE HIGHWAY AND TRANSPORTATION DEPARTMENT,	THE HONORABLE DAVID B. BOGARD, JUDGE.
APPELLEES.	AFFIRMED.

OTIS H. TURNER, Associate Justice

This action commenced as a claim filed by appellants with the Arkansas Claims Commission.

Potashnik Corporation and Sajan Construction Corporation contracted with the Arkansas Highway and Transportation Department for certain highway construction.

Following default of the original contractors, Fireman's Insurance Company as surety on the contractor's performance bond, retained Blattner and Sons, Inc. to complete the projects. During completion of construction, disputes arose between Fireman's and Blattner on the one hand and the Arkansas Highway and Transportation Department on the other, over costs and damages alleged to have occurred during completion, for which Fireman's and Blattner claimed entitlement from the department.

A complaint was filed with the Arkansas State Claims Commission and the hearing was held at which Fireman's and Blattner were afforded an opportunity to prove their claim. A complete transcript of that hearing was made and preserved. The Claims Commission subsequently issued its written order finding no improper action on the part of the Highway and

Transportation Department and denied the claim in its entirety.

From that order the appellant petitioned the circuit court for review under the provisions of the Administrative Procedure Act and subsequently filed in circuit court a petition for writ of certiorari seeking a reversal of the Commission's order and entry of judgment, or in the alternative, a de novo jury trial or oral hearing and written briefs. The appellees moved to dismiss the petition for writ of certiorari and petition for Administrative Procedure Act review. After a hearing the motion was granted and the petitions dismissed. From this order of dismissal, Fireman's and Blattner bring this appeal.

Though the appellants make persuasive arguments, we are persuaded that the

sovereign immunity granted by the Constitution of the State of Arkansas bars an action against the state and that the procedure for hearing claims as established by the General Assembly meets due process requirements and that the order of the circuit court should be affirmed.

Six alleged errors are asserted by appellant: (1) the Administrative Procedures Act applies here and judicial review from the Claims Commission should therefore be granted, (2) Arkansas case law dictates a review of the Claims Commission decisions by certiorari to the circuit court; (3) sovereign immunity would not be violated by review under either the Administrative Procedure Act or on certiorari; (4) the circuit court was in error in holding that the Claims Commission is an arm of the General Assembly; (5) the Claims Commission's order and the court's denial of

review is violative of appellant's due process rights; (6) the Claims Commission's order and the dismissal by the court of appellant's petition for review is violative of the doctrine of separation of powers.

In holding that the doctrine of sovereign immunity as dictated by the Arkansas Constitution and interpreted by a long line of case law bars the relief sought by appellant, the first five of appellant's points will be considered together. The Constitution of Arkansas provides that the state of Arkansas shall never be made a defendant in any of her courts. Arkansas Constitution of 1874, Article 5, Section 20. The completeness of the intent of such immunity is best illustrated by the long and unequivocal line of cases expressly recognizing and protecting the immunity. As early as Pitcock v. State, 91 Ark. 527,

121 S.W. 742 (1909), this court held that the constitutional prohibition was not merely declaratory that the state could not be sued without her consent, but that all suits against the state were expressly forbidden. Further, where the pleadings show that the action is, in effect, one against the state, the trial court acquires no jurisdiction.

Extending this immunity to its next logical step, we held that where a suit is brought against an agency of the state with relation to some matter in which the defendant represents the state in action and liability, and the state, though not a party of record, is the real party in interest so that a judgment for plaintiff would operate to control the action of the state or to subject the state to liability, the action is, in effect, one against the state and prohibited by the constitutional

bar. Page v. McKinley, 196 Ark. 331, 118 S.W.2d 235 (1938). See also, Beaulieu v. Gray, 288 Ark. 395, 705 S.W.2d 880 (1986).

To further illustrate the intent of the General Assembly to keep and maintain a doctrine of complete sovereign immunity, this court, in 1979, while recognizing the complete immunity enjoyed by the state for the acts of its officers and employees, held that in the absence of specific legislation extending immunity to those officers and employees, they were not individually protected under the umbrella of the state's immunity. At the very next session of the legislature, a statute was passed extending the state's immunity to its officers and employees in the absence of malicious acts. Ark. Code Ann. §19-10-305 (1987).

The only exception to total and complete sovereign immunity from claims which has been recognized by this court occurs

when the state is the moving party seeking specific relief. In that instance the state is prohibited from raising the defense of sovereign immunity as a defense to a counterclaim or offset. Parker v. Moore, 222 Ark. 811, 262 S.W.2d 891 (1953).

In addition to Article 5 of the Constitution invoking sovereign immunity in relation to actions against the state, the framers of the Constitution included a subsequent provision stating that the General Assembly shall provide for payment of all just and legal debts of the state. Arkansas Constitution of 1874, Article 16, Section 2. For many years these debts, after processing by the legislature, were paid by special acts of the General Assembly for claimants the legislature deemed deserving. As the state grew and the legislative demands increased, the General Assembly was apparently unable to

devote sufficient time to the investigation and action required in handling each individual claim. The answer was passage of the first Claims Commission Act in 1933. A similar act was passed each two years thereafter until Act 53 of the 1945 General Assembly was enacted, creating the Board of Fiscal Control, the first continuing body to consider whether the individual claims against the state were "just and legal debts" which should be honored and worthy of recommendation to the General Assembly for the appropriation of funds for payment.

In 1949 the General Assembly created the State Claims Commission by Act 462 of 1949, which granted to the Commission exclusive jurisdiction over all claims against the state and its agencies, departments and institutions (with certain exceptions not here involved). Section 6 of Act 462 provided that "[t]he action taken by

the Commission with respect to the allowance or disallowance of a claim, in whole or in part, shall be final and binding on all parties thereto and shall not be subject to judicial review at their instance." (Emphasis added.) Further, that "[a]fter the hearing, the Commission shall prepare a finding of fact and make a determination for disposition of the claim, which finding and determination, together with the entire record shall be made available to the General Assembly at its session next succeeding the Commission's action on the claim." Thereafter, "the State Comptroller shall submit to [the General Assembly] an appropriation bill covering specifically each claim approved by the Commission prior to that date." Section 6 of the Act concluded by declaring that the Act shall in no manner be construed as enlarging the liabilities of the state or any of its agencies.

Act 373 of 1951 amended sections 1, 4, 7, 9, 10 and 12 of Act 462 of 1949 and repealed sections 8 and 14. Section 6, however, was neither amended nor repealed.

Section 1 of Act 276 of 1955 abolished the "State Claims Commission" established by Act 462 of 1949 and established a new commission, the "Arkansas State Claims Commission," which was declared in Section 3 to "have all the powers, duties and jurisdiction of the Commission which it replace[d]." Act 276 further directed that the "Commission" thus created "shall be governed by all laws now or hereafter provided for the government of claim proceedings in this State." Section 4 repealed "[a]ll laws and parts of laws in conflict herewith."

The repealer clause, however, did not affect section 6 of Act 462 of 1949. Nothing in the 1955 Act addressed the mechanics

of Commission action and review. Instead, Act 276 of 1955 dealt with the composition of the Commission and the compensation of its members.

The legislature has thus created a method by which claims alleged to be "just and legal debts of the state" shall be filed, processed, and reviewed by the General Assembly while preserving the state's sovereign immunity as declared in the Constitution.

We are not impressed by appellants' argument that the dismissal by the circuit court of the petition for certiorari and review under the Administrative Procedure Act constitutes a denial of appellants' due process rights. The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. Armstrong v. Manzo, 380

U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965). The due process requirements of the Constitution are satisfied when an adequate post-deprivation procedure exists. See Parratt v. Taylor, 451 U.S. 524, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). The Arkansas post deprivation procedure is through the claims commission process.

The Arkansas Administrative Procedure Act, Ark. Code Ann. §§25-15-201 to 25-15-213 (1987 and Supp. 1989), providing for a review from actions of state commissions and agencies, has no application to the State Claims Commission. The act creating the Claims Commission clearly creates it as an arm of the legislature, reporting solely to that body. Section 25-15-202(1) defining "agency", states that agency means each board, commission, department, officer or other authority of the government of the

state of Arkansas, whether or not within or subject to review by another state agency, except the General Assembly, the courts and the Governor.

Since the act creating the Claims Commission grants the power of review only to the legislature and without question delegated to the commission duties which are, under the Constitution, solely the duties of the General Assembly, the claims commission proceedings are thus proceedings of the General Assembly and not subject to the provisions of the Administrative Procedure Act.

Appellants are thus obliged to seek review by the General Assembly under the Claims Commission rule promulgated by the Commission under the authority of the General Assembly. Appellants have elected to bypass those rules and proceedings and seek direct review by the judicial system

without exhausting the remedies provided by the claims commission.

Appellants have no standing to argue a denial of due process unless and until they have exhausted their procedural remedies. See Barr v. Arkansas Blue Cross and Blue Shield, Inc., 297 Ark. 262, 761 S.W.2d 174 (1988). In this instance the remaining remedy is a review by the General Assembly.

Since we hold that the claims commission is an arm of the General Assembly and the General Assembly has total control over the determination of and subsequent funding for, payment of the "just debts and obligations of the state" -- all other avenues for redress through legal proceedings being barred by the sovereign immunity provision of the Arkansas Constitution, appellants' argument that the State Claims Commission system, without a provision for judicial

review, violates the separation of powers doctrine, is without merit.

Affirmed.

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS

FIREMAN'S INSURANCE CO.
& D.H. BLATTNER & SONS, INC. PLAINTIFFS

V. No. CIV-88-7241

ARKANSAS STATE CLAIMS COMMISSION
AND ARKANSAS HIGHWAY AND
TRANSPORTATION DEPARTMENT DEFENDANTS

ORDER AND JUDGMENT

Comes now the Court after oral argument by plaintiffs and defendants upon defendants' motions to dismiss plaintiffs' petition for review. This Court hereby grants defendants' motions to dismiss plaintiffs' petition with prejudice because this Court lacks jurisdiction and plaintiffs have failed to state facts upon which relief can be granted.

Plaintiffs' petition seeks a review of a decision by the Arkansas State Claims Commission. However, there is no judicial

review of decisions by the Claims Commission. Article 5, §20 of the Constitution of Arkansas provides "The State of Arkansas shall never be made defendant in any of her courts." Any judgment entered by this Court in favor of plaintiff would actually be a judgment against the State of Arkansas which is prohibited under the sovereign immunity of Article 5, §20.

It is a legislative function to decide which debts against the State will be paid. Article 16, §2 of the Constitution of Arkansas states: "The General Assembly shall from time to time provide for the payment of all just and legal debts of the State." The Arkansas State Claims Commission acts as an investigative arm of the General Assembly in hearing claims against the State. However, it is within the General Assembly's discretion as to which debts against the State are just and should be paid pursuant to Article 16, §2.

Plaintiffs assert the Arkansas Administrative Procedure Act, A.C.A. §25-15-201 et seq. as a basis for this Court's jurisdiction. The General Assembly is specifically excepted from the provisions of this Act in A.C.A. §25-15-202(1). Thus the Commission which serves at the will of the General Assembly and which is an integral part of the Legislature is not subject to the Arkansas Administrative Procedure Act.

Because it is the Legislature's constitutional mandate to determine which debts against the state should be paid, any judgment for plaintiffs by this Court would be unenforceable. This Court will not be put in the position of rendering unenforceable advisory opinions.

Having ruled on the jurisdictional questions, it is not necessary to reach other points raised by plaintiffs in opposition to defendants' Motions to Dismiss.

Therefore, IT IS ORDERED AND ADJUDGED that defendants' motions to dismiss be granted and plaintiffs' petition for review be dismissed with prejudice.

Dated this 15 day of May, 1989.

/s/ David B. Bogard
THE HONORABLE DAVID B. BOGARD
Pulaski County Circuit Judge,
Sixth Division

APPROVED AS TO FORM ONLY:

/s/ Lynda K. Pilgrim
LYNDA K. PILGRIM
Assistant Attorney General
Attorney for Arkansas State
Claims Commission

/s/ Robert L. Wilson
ROBERT L. WILSON
Attorney for Arkansas State
Highway and Transportation
Department

Niewald, Waldeck, Norris & Brown
Kevin E. Glynn

By: _____
ROBERT R. ROSS
Arnold, Grobmyer & Haley
Attorneys for Plaintiffs
Fireman's Insurance Co. of
New Jersey and D.H. Blattner
& Sons, Inc.

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS

FIREMAN'S INSURANCE CO.
& D.H. BLATTNER & SONS, INC. PLAINTIFFS

V. No. CIV-88-7251

ARKANSAS STATE CLAIMS COMMISSION
AND ARKANSAS HIGHWAY AND
TRANSPORTATION DEPARTMENT DEFENDANTS

ORDER AND JUDGMENT

Comes now the Court after oral argument by plaintiffs and defendants upon defendants' motions to dismiss plaintiffs' petition for a writ of certiorari. This Court hereby grants defendants' motions to dismiss plaintiffs' petition with prejudice because this Court lacks jurisdiction and plaintiffs have failed to state facts upon which relief can be granted.

Plaintiffs' petition seeks a review of a decision by the Arkansas State Claims Commission. However, there is no judicial review of decisions by the Claims Commission. Article 5, §20 of the Constitution

of Arkansas provides "The State of Arkansas shall never be made defendant in any of her courts." Any judgment entered by this Court in favor of plaintiff would actually be a judgment against the State of Arkansas which is prohibited under the sovereign immunity of Article 5, §20.

It is a legislative function to decide which debts against the State will be paid. Article 16, §2 of the Constitution of Arkansas states: "The General Assembly shall from time to time provide for the payment of all just and legal debts of the State." The Arkansas State Claims Commission acts as an investigative arm of the General Assembly in hearing claims against the State. However, it is within the General Assembly's discretion as to which debts against the State are just and should be paid pursuant to Article 16, §2.

Because it is the Legislature's constitutional mandate to determine which debts against the state should be paid, any judgment for plaintiffs by this Court would be unenforceable. This Court will not be put in the position of rendering unenforceable advisory opinions.

Having ruled on the jurisdictional questions, it is not necessary to reach other points raised by plaintiffs in opposition to defendants' Motions to Dismiss.

Therefore, IT IS ORDERED AND ADJUDGED that defendants' motions to dismiss be granted and plaintiffs' petition for a writ of certiorari be dismissed with prejudice.

Dated this 15 day of May, 1989.

/s/ David B. Bogard
THE HONORABLE DAVID B. BOGARD
Pulaski County Circuit Judge,
Sixth Division

APPROVED AS TO FORM ONLY:

/s/ Lynda K. Pilgrim
LYNDA K. PILGRIM
Assistant Attorney General
Attorney for Arkansas State
Claims Commission

/s/ Robert L. Wilson
ROBERT L. WILSON
Attorney for Arkansas State
Highway and Transportation
Department

Niewald, Waldeck, Norris & Brown
Kevin E. Glynn

By: _____
ROBERT R. ROSS
Arnold, Grobmyer & Haley
Attorneys for Plaintiffs
Fireman's Insurance Co. of
New Jersey and D.H. Blattner
& Sons, Inc.

STATE CLAIMS COMMISSION DOCKET

Amount of Claim $ 1,382,224.80

Claim No. 87-402C-CC

FIREMAN'S INSURANCE COMPANY OF
NEWARK, NEW JERSEY AND ITS
COMPLETING CONTRACTOR, D.H. BLATTNER
& SONS OF AVON, MINNESOTA Claimant

vs.

ARKANSAS STATE
HIGHWAY DEPARTMENT Respondent
State of Arkansas

Date Filed November 12, 1987

Attorneys
KEVIN E. GLYNN, ATTORNEY
BOB ROSS, ATTORNEY, CLAIMANT

TOM LORENZO, STAFF ATTORNEY,
RESPONDENT

Type of Claim BREACH OF CONTRACT

FINDING OF FACTS

The Claimant, Fireman's Insurance Company, represented by Mr. Kevin Glynn and Mr. Bob Ross, Attorneys-at-Law, and the

Respondent, Arkansas State Highway Department, represented by Mr. Tom Lorenzo, Staff Attorney, were present at a hearing on Monday, September 12, 1988.

The Commission unanimously finds that Claimant failed to prove any improper action on the part of Arkansas State Highway Department. Therefore, this claim is unanimously denied and dismissed.

IT IS SO ORDERED.

CONCLUSION

This claim is hereby unanimously denied and dismissed.

Date of Hearing September 12, 1988

Date of Disposition October 20, 1988

/s/ Milas Hale,
Chairman

/s/ Diane Pieroni,
Commissioner

/s/ Hayward Battle,
Commissioner

OFFICE OF THE CLERK
SUPREME COURT OF THE STATE OF ARKANSAS
ARKANSAS COURT OF APPEALS
Justice Building
625 Marshall Street
Little Rock, AR 72201

March 26, 1990

Robert R. Ross
Attorney at Law
P.O. Box 70
Little Rock, AR 72203

Kevin E. Glynn
Attorney at Law
2500 Commerce Tower
911 Main Street
Kansas City, Missouri 64105

Re: 89-245 Fireman's Insurance Company, et al. v. Arkansas State Claims Commission, et al.

Gentlemen:

The Supreme Court made the following order in the above styled case today:

"Petition for Rehearing is denied. Dudley and Price, JJ., not participating."

Sincerely yours,

/s/ Leslie W. Steen,
Clerk

LWS:rh
cc: Tom G. Lorenzo
Jacquetta Alexander
(#CIV-88-8362)

IN THE
ARKANSAS SUPREME COURT

No. 89-245

FIREMAN'S INSURANCE
COMPANY AND D.H. BLATTNER
& SONS, INC., APPELLANTS

vs.

ARKANSAS STATE CLAIMS
COMMISSION AND ARKANSAS
STATE HIGHWAY AND
TRANSPORTATION DEPARTMENT APPELLEES

AN APPEAL FROM THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS
SIXTH DIVISION
HONORABLE DAVID B. BOGARD,
CIRCUIT JUDGE

BRIEF OF APPELLANTS FIREMAN'S INSURANCE COMPANY and D.H. BLATTNER & SONS, INC.

V. THE CIRCUIT COURT ERRED IN DISMISSING APPELLANTS' PETITION FOR WRIT OF CERTIORARI AND APPELLANTS' PETITION FOR REVIEW BECAUSE THE ARKANSAS STATE CLAIMS COMMISSION SYSTEM, AND SPECIFICALLY THE ARKANSAS STATE CLAIMS COMMISSION'S ORDER OF OCTOBER 20, 1988, VIOLATED APPELLANTS' DUE PROCESS RIGHTS.

Appellants have argued in Points I-IV that the Circuit Court's Orders of May 15, 1989 were in error because the Court found that there is no judicial review of the Claims Commission's Order. The Circuit Court's Orders of May 15, 1989 are also erroneous because the Circuit Court failed to find that the Claims Commission's Order of October 20, 1988 and the Claims Commission's Rules and Regulations which provide for review by the General Assembly denied appellants their due process rights under the Fourteenth Amendment to the United States Constitution.

Arkansas provides for inadequate post-deprivation remedies in violation of due process under the system of legislative

review of Claims Commission decisions. The Court in Bumgarner v. Bloodworth, 738 F.2d 966 (8th Cir. 1984) held that a due process claim would not be subject to dismissal, rejecting the argument that Arkansas provides adequate post-deprivation remedies. The Court stated that one of its reasons for concluding that Arkansas does not provide adequate post-deprivation remedies is that the Arkansas General Assembly approves Claims Commission awards in excess of $2,000, and payment of such funds is conditioned on appropriation of funds by the legislature. Id., at 968.

Georgia has a claims system which has been held to violate due process and which is similar to the Arkansas Claims Commission system, in the absence of judicial review. In the Georgia system, a claim against the State is limited by statute to a claim filed with the State Advisory

Board, whose decisions are subject to review and approval by the State legislature pursuant to OCGA §23-5-60 et seq. and OCGA §28-5-80 et seq.

In Hight v. Burden, 350 S.E.2d 471 (Ga.App. 1986), the Georgia Court of Appeals considered this system and held that due process required that the plaintiff should be entitled to bring an action in Court against the State, even though the Georgia Constitution provides for sovereign immunity and the Georgia statutes provide for legislative review of Board decisions. The Court held that Parratt v. Taylor, supra, and Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984) would not bar the Court's consideration of plaintiffs' claim against the State because "no adequate post deprivation remedy" was provided to the plaintiff in a system in which a State claims commission's

decisions were subject to review and change by the State legislature.

The Court in Lambert v. McFarland, 612 F.Supp. 1252 (N.D.Ga. 1984) also considered this issue. Defendant City of Atlanta argued that even if the plaintiff's due process complaints were true, defendant should be entitled to summary judgment pursuant to Parratt, supra, as adequate state remedies existed for the alleged deprivation. The Court rejected defendant's Parratt argument because the City enjoyed immunity from liability pursuant to state law. The Court held:

> "The United States Supreme Court recognized this term in Hudson v. Palmer, __ U.S. __, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984), that consideration of state doctrines of immunity is relevant in determining the "adequacy" of

state remedies. Where, as in the present case, the municipal corporation of the City of Atlanta is immune from suit in performing the governmental function of maintaining the jail, the court cannot conclude as a matter of law that adequate state remedies exist. Therefore, defendants' motion for summary judgment on the Parratt question is DENIED."

(Id., at 1267-1268).

Copies of these Georgia statutes and the Hight decision are set forth at pages 107-127 of the Appendix.

The Courts of several other states have held that due process requires the right of judicial review of an administrative decision, even if such judicial review is not provided by statute. State ex rel. State Tax Commission v. Luten, 459 S.W.2d 375, 376 (Mo. banc 1970); City of Hammond

v. Red Top Trucking Co., Inc., 409 N.E.2d 655, 658 (Ind.App. 1980); Mathis v. Cooperative Vendors, Inc., 354 N.E.2d 269, 274 (Ind.App. 1976); Bloom v. Texas State Board of Examiners of Psychologists, 475 S.W.2d 374, 378 (Tex.App. 1972), reversed on other grounds, 492 S.W.2d 460 (1973); Graves v. Cogswell, 552 P.2d 224, 225 (Idaho 1976).

The Arkansas law also requires that due process must be fulfilled in a quasi-judicial proceeding such as the Claims Commission's proceedings regarding appellants' claims in this case. In McBride v. Daniels, 269 Ark. 705, 600 S.W.2d 425 (Ark.App. 1980), the Arkansas Court of Appeals held:

> "Due process alone dictates something more than a perfunctory consideration of one's request for a review of a decision in an adversary proceeding, and this is especially true where, as

here, the claimant has economic rights at stake. While the proceedings below are termed administrative, they nonetheless entail quasi-judicial functions which must measure up to the standards of due process."

(Id., at 426).

The Claims Commission's Order of November 20, 1988 fails to meet these standards of due process as the Commission's brief Order, which bears no relation to appellants' pleadings or the issues or evidence presented at the hearing, fails to fulfill the McBride requirement of more than a "perfunctory consideration" of appellants' claims.

Professor Rodney A. Smolla, in his article Politics and Due Process Don't Mix: Should the State Claims Commission Be Abolished?, 1986 Ark. L. Notes 43 (1986) (Appendix, pp. 128-139) concluded that the

Arkansas legislature's power to influence decisions of the Claims Commission results in a violation of due process:

> "the Claims Commission approach to handling claims against the state is conceptually flawed. No matter how conscientious and able the men and women appointed to the Commission may be, they function in a setting inherently in tension with values of due process and economic efficiency." (Smolla, supra, at 44)(Appendix, p. 129).

Professor Smolla explained at length how due process is violated by the Claims Commission's present system on page 50 of his article (Appendix, p. 135), and concluded:

> "The Claims Commission, because it is grounded in the doctrine of sovereign immunity, and because it is dependent

on later legislative approval of all but noncontroversial small claims, does not in the final analysis dispense due process at all; instead it dispenses legislative grace. An Arkansan injured by his or her own state has no real legal rights at all, no real guarantee of genuine due process, but only the opportunity to petition the legislature for mercy, dispensed by its agent, the Commission."

(Smolla, supra, at 50)(Appendix, p. 135)

In this case, the Claims Commission's Order of October 20, 1988 bears no relation to appellants' pleadings or the issues and evidence presented at the hearing. The Courts of other states which have considered such a situation have held that due process is violated. In D'Acquisto v. Washington, 640 F.Supp. 594, 622 (N.D. Ill.

1986) the Court held that an agency charged with making a decision should make an independent decision rather than automatically and uncritically accepting the view of an adversary. If the decision maker is under so much pressure from an adversary that in effect the decision maker and the adversary are the same person, due process is violated. In Bunnell v. Industrial Commission of Utah, 740 P.2d 1331, 1333 (Utah 1987), the Supreme Court held that due process is violated when the appearance of unfairness is so plain that a reasonable person would find an administrative proceeding unfair. In this case, the Claims Commission denied appellants' claim in its brief Order of October 20, 1988 which is irrelevant to the pleadings, issues and evidence. The appearance of unfairness establishes that due process has been violated.

Portions of Section VI

* * * *

The Claims Commission is subject to more than "subtle coercion" by the legislature. Recent examples of direct interference by the legislature in the decisions of the Claims Commission are set forth in articles from the Arkansas Gazette. (Appendix, pp. 140-150).

* * * *

Professor Smolla, in his article Politics and Due Process Don't Mix: Should the State Claims Commission be Abolished?, 1986 Ark. L. Notes 43 (1986)(Appendix, pp. 128-139), noted that a political controversy took place in the 1985 legislative session of the Arkansas General Assembly regarding the existence and functioning of the Claims Commission. Professor Smolla stated:

"What is important is that there was a political controversy at all - for the very existence of the political squabble over the Commission's performance revealed a fundamental fact of life about the State Claims Commission: the Commission is in theory and function an agent of the legislature, and as such is inherently a creature of politics. Although the Commission ostensibly 'adjudicates' individual claims against the state and operates with the trappings of a judicial body, using procedural and evidentiary rules that are less formal but nonetheless analogous to the rules observed by the courts, the Commission's lines of power run directly to the legislature."
(Smolla, supra, at 43)(Appendix, p. 128).

Professor Smolla concluded:

"The Claims Commission acts merely as the legislature's grace-dispencing agent, with its decisions as to how the state's precious largess should be distributed constantly subject to legislative countermand."

(Smolla, supra, at 50)(Appendix, p. 135).

In this case, the Claims Commission heard appellants' claim, which could potentially subject the State to damages in an amount exceeding one million dollars. Ample evidence in support of the claim, including expert testimony, was presented by the appellants. The Highway Department did not counter with any meaningful evidence or explanation to rebut appellants' claims. The transcript reveals that the Claims Commission members commented directly on the failure of the Highway

Department to rebut appellants' evidence. (Transcript pp. 148, 225-226, 259-260; Appendix, pp. 168-172). Nevertheless, the Claims Commission denied appellants' claims in its very brief Order of October 20, 1988 which contained no findings of fact or conclusions of law in violation of Ark. Code Ann. §25-15-210(b)(2), and which had nothing to do with appellants' claims or the legal theories under which the claims were brought. It is difficult to avoid the conclusion that the pressure on the Commission which inevitably results from legislative review of Claims Commission decisions did not play some part in the Commission's otherwise inexplicable Order of October 20, 1988. (Appendix, pp. 12, 3[illegible]).

Professor Smolla also pointed out another potential for abuse in the Claims Commission's present structure. The Claims Commission may make arbitrary decisions

denying claims (such as the Order of October 20, 1988), with the thought that the legislature will probably be delighted not to pay the claims, regardless of the merits. Professor Smolla concluded:

> "The Commission is directed by statute to conduct its adjudications in a 'judicial manner;' it follows informal rules of procedure and evidence; it looks by analogy much more like a court than a legislative body.
>
> But as it is structured in Arkansas, the Commission's real identity is more legislative than judicial. The Commission lacks the single most important component of the judicial function - indeed, the single most important component in the very notion of a tribunal able to dispense meaningful due process of law in an adjudicatory setting: independence." (Footnotes omitted).

(Smolla, supra, at 49)(Appendix, p. 134).

Professor Smolla analyzed the advantages of judicial review as opposed to the present system of review by the legislature of the Claims Commission's decisions:

> "The primary difference between recovery from the sovereign through the Claims Commission and subsequent appropriation by the General Assembly, and recovery through a judgment of a court enforceable through traditional legal process, is certainty. . . The basic assumption of the judicial process is that if one manages to put forward satisfactory evidence of one's legal entitlement to recompense, the court will grant the remedy, without regard to any 'political' factors. A claim for breach of contract or for violation of a duty recognized by tort law is a

claim based on an enforceable right, while a request for payment from the legislature is to ask for the graceful intercession of a political body." (Smolla, supra, at 52)(Appendix, p. 137).

Professor Smolla analyzed the the harmful effect of this system and concluded:

"Under our current regime, there is no apparent legal remedy for the most egregious breach of contract, or the most gruesome life-depriving act. There is a remedy of sorts, but it is not legal, in the sense that it is not grounded in any enforceable mechanism resembling what we would normally consider the 'operation of law.'. . . For if the Commission abuses its power, if it ignores the evidence, contravenes its own procedural rules, or operates

out of irrational whim or caprice, there is nothing that can be done about it, save petitioning the General Assembly."

(Id., at 50)(Appendix, p. 135).

IN THE
ARKANSAS SUPREME COURT

No. 89-245

FIREMAN'S INSURANCE
COMPANY AND D.H. BLATTNER
& SONS, INC., APPELLANTS

vs.

ARKANSAS STATE CLAIMS
COMMISSION AND ARKANSAS
STATE HIGHWAY AND
TRANSPORTATION DEPARTMENT APPELLEES

AN APPEAL FROM THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS
SIXTH DIVISION
HONORABLE DAVID B. BOGARD,
CIRCUIT JUDGE

REPLY BRIEF OF APPELLANTS FIREMAN'S INSURANCE COMPANY and D.H. BLATTNER & SONS, INC.

V. THE CIRCUIT COURT ERRED IN DISMISSING APPELLANTS' PETITION FOR WRIT OF CERTIORARI AND APPELLANTS' PETITION FOR REVIEW BECAUSE THE ARKANSAS STATE CLAIMS COMMISSION SYSTEM, AND SPECIFICALLY THE ARKANSAS STATE CLAIMS COMMISSION'S ORDER OF OCTOBER 20, 1988, VIOLATED APPELLANTS' DUE PROCESS RIGHTS.

Both the Claims Commission and the Highway Department are mistaken in their arguments on the due process issues as they misinterpret Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981).

In Parratt, the United States Supreme Court held that a State must provide adequate post-deprivation remedies or due process is violated. The Eighth Circuit Court of Appeals held in Birkenholz v. Sluyter, 857 F.2d 1214, 1217-1218 (8th Cir. 1988) that adequate post-deprivation remedies under Parratt were provided when the State statute authorized a de novo post-deprivation evidentiary hearing before a Circuit Court, which would review the validity of the agency decision. Appellees

disagree with the Eighth Circuit and argue that the opposite position is correct, that although Arkansas does not provide for any review by a court of the Claims Commission's decisions, the Arkansas system still complies with the due process requirements set forth in Parratt. Appellees' arguments are inconsistent with the Eighth Circuit's holding in Birkenholz and other courts which have decided these issues, such as Hight v. Burden, 350 S.E.2d 471 (Ga.App. 1986); Lambert v. McFarland, 612 F.Supp. 1252 (N.D. Ga. 1984) and the other cases set forth on pages 29 and 30 of appellants' Brief.

It is noteworthy that the Claims Commission does not discuss Hight and Lambert in any detail, stating only that the Arkansas Supreme Court is not bound by decisions of the Georgia courts. However, the Claims Commission did not hesitate to

rely on law from Texas and other foreign jurisdictions throughout its Brief.

Appellees try to factually distinguish Bumgarner v. Bloodworth, 738 F.2d 966 (8th Cir. 1984), but they cannot change the fact that the Eighth Circuit stated in that case that Arkansas does not provide adequate post-deprivation relief because the Arkansas General Assembly approves Claims Commission awards in excess of $2,000.00, and payment of such funds is conditioned on appropriation of funds by the legislature. Id., at 968.

A misleading impression is created by the Claims Commission's presentation of Professor Smolla's article, Politics and Due Process Don't Mix: Should the State Claims Commission Be Abolished?, 1986 Ark. L. Notes 43 (1986)(Appendix, pp. 128-139). The Claims Commission quotes a portion of the article but omits the fact that

in the very next paragraph after its quoted portion, Professor Smolla takes a position contrary to the Claims Commission and states that he will demonstrate that the Claims Commission's procedure does not provide for enough due process. Id., at 49. (Appendix, p. 134).

Likewise, both the Claims Commission and the Highway Department omit language unfavorable to their positions in presenting Professor Smolla's article, The Displacement of Federal Due Process Claims by State Tort Remedies: Parratt v. Taylor and Logan v. Zimmerman Brush Company, 1982 U. Ill. L. Rev. 831 (1982). Appellees quote a sentence which states that the Arkansas procedure should pass muster under the due process clause, but in the very next sentence, which is omitted by appellees, Professor Smolla states that the state procedure should not be deemed adequate under

Parratt if the claims procedure was a petition to a prison warden who exercised his discretion without convening any hearing before administrators and without any provision for judicial review. Id., at 885.

Appellees' selective editing of Professor Smolla's articles, in which portions of the articles which do not favor them are omitted, reveals the weakness of their position.

IN THE
ARKANSAS SUPREME COURT

No. 89-245

FIREMAN'S INSURANCE COMPANY AND D.H. BLATTNER & SONS, INC., APPELLANTS

vs.

ARKANSAS STATE CLAIMS COMMISSION AND ARKANSAS STATE HIGHWAY AND TRANSPORTATION DEPARTMENT APPELLEES

PETITION FOR REHEARING

COME NOW Fireman's Insurance Company and D.H. Blattner & Sons, Inc. and for their Petition for Rehearing state:

1. This Court stated in its Opinion that appellants have no standing to argue a denial of due process unless and until they have sought a review of the Claims Commission's decision by the General Assembly.

This holding by the Court should be reversed as there is no published procedure

or mechanism for review of the Claims Commission's decision by the General Assembly, and appellants have no way to request review by the General Assembly. Thus, this Court should hold that appellants have standing to argue a denial of due process.

2. This Court held that the Claims Commission process is adequate to satisfy due process concerns as set forth in Parratt v. Taylor, 451 U.S. 527 (1981). This Court should reverse its decision on this point as it is contrary to the Eighth Circuit Court of Appeals' holding in Birkenholz v. Sluyter, 857 F.2d 1214, 1217-1218 (8th Cir. 1988).

IN THE
ARKANSAS SUPREME COURT

No. 89-245

FIREMAN'S INSURANCE
COMPANY AND D.H. BLATTNER
& SONS, INC., APPELLANTS

vs.

ARKANSAS STATE CLAIMS
COMMISSION AND ARKANSAS
STATE HIGHWAY AND
TRANSPORTATION DEPARTMENT APPELLEES

BRIEF IN SUPPORT OF PETITION FOR REHEARING

COME NOW Fireman's Insurance Company and D.H. Blattner & Sons, Inc. and for their Brief in Support of their Petition for Rehearing, state:

1. This Court held that appellants have no standing to argue denial of due process unless and until they have exhausted their procedural remedies, in this case, a review by the General Assembly. This Court should reverse that holding because there is no procedure or mechanism for

appellants to seek or obtain review by the General Assembly.

There are no published procedures or rules regarding review by the General Assembly of a Claims Commission's decision. The Arkansas statutes and the Claims Commission's Rules and Regulations are silent regarding the mechanism for such review by the General Assembly. (Appendix pp. 38-53).

In addition, claimants are not provided with a meaningful opportunity for review by the General Assembly, which meets according to the Arkansas Constitution and statutes only once every two years for sixty days or as the Governor proclaims for extraordinary occasions. Article 5, Section 5 of the Arkansas Constitution provides that the General Assembly shall meet every two years. Ark. Code Ann. §10-2-101 provides that the General Assembly shall

meet in regular biennial session on the second Monday in January in each odd numbered year, unless the odd numbered year follows the election of a non-incumbent Governor, in which case the General Assembly remains in session for only two days.

Article 5, Section 17 of the Arkansas Constitution provides that the regular biennial sessions shall not exceed sixty days in duration, unless extended by a vote of two-thirds of the members elected to each house of the General Assembly.

In State ex rel. Purcell v. Jones, 242 Ark. 168, 412 S.W.2d 284 (Ark. 1967), this Court held that there are only two types of sessions of the General Assembly, the regular biennial sessions provided by Article 5, Section 5 and 17 of the Arkansas Constitution, and the sessions which the Governor by proclamation convenes under Article 6,

Section 19 of the Arkansas Constitution, in which the Governor specifies the purpose for the session. The General Assembly may not take up any business other than that set forth in the Governor's proclamation.

Thus, not only are there no published procedures or mechanisms for seeking review of a Claims Commission's decision to the General Assembly, but the General Assembly is in session only once every two years for sixty days, unless its members decide to extend the session by a two-thirds vote or unless the Governor proclaims a special session for specified purposes. Thus, claimants such as Fireman's Insurance Company and D.H. Blattner & Sons, Inc. are not provided with a meaningful time or opportunity for review of a Claims Commission's decision. If the General Assembly chooses not to consider an appeal from a Claims

Commission's decision within their sixty-day session, and chooses not to extend the session, appellants would have to wait another two years before they could present their appeal again, with no promise that it would be heard by the General Assembly two years later.

In practical effect, unless a member of the General Assembly takes a strong interest in a claimant and sponsors a bill to have a decision of the Claims Commission reviewed by the General Assembly, the General Assembly is not going to consider an appeal from a Claims Commission's decision. Particularly for out of state businesses such as Fireman's Insurance Company and D.H. Blattner & Sons, Inc. who have no particular ties to any member of the General Assembly, this system effectively prevents review by the General Assembly of the Claims Commission's decision.

For all of these reasons, it would be futile for Fireman's Insurance Company and D.H. Blattner & Sons, Inc. to appeal the Claims Commission's decision to the General Assembly. The law is well-settled that exhaustion of administrative remedies is not required to entitle one to judicial review when no genuine opportunity for adequate relief exists, or where an administrative appeal would be futile. Barr v. Arkansas Blue Cross and Blue Shield, Inc., 297 Ark. 262, 761 S.W.2d 174, 177 (Ark. 1988); Arkla Exploration Company v. Texas Oil and Gas Corp., 734 F.2d 347, 355 (8th Cir. 1984), cert. denied 469 U.S. 1158, 105 S.Ct. 905, 83 L.Ed.2d 920 (1985).

2. This Court held that Arkansas provides adequate post-deprivation remedies with its Claims Commission process, to satisfy due process requirements. This Court should reverse that portion of its

decision as it is contrary to the Eighth Circuit Court of Appeals' holding in Birkenholz v. Sluyter, 857 F.2d 1214, 1217-1218 (8th Cir. 1988). The Eighth Circuit held in Birkenholz that adequate post-deprivation remedies, sufficient for due process requirements, were provided only when the State statute authorized a de novo post-deprivation evidentiary hearing before the Circuit Court, which would review the validity of the agency's decision.

The Claims Commission process in Arkansas does not provide a de novo post-deprivation evidentiary hearing before the Circuit Court, so that a Circuit Court may review the validity of the agency decision. The Eighth Circuit ruled in Birkenholz that a system such as Arkansas' Claims Commission's process does not provide adequate post-deprivation remedies to satisfy due process requirements.

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SIXTH DIVISION
Case Nos. 88-7241 and 88-7251

FIREMAN'S INSURANCE COMPANY and D. H. BLATTNER & SONS, INC.,	)
Plaintiffs,	)
vs.	)
ARKANSAS STATE CLAIMS COMMISSION	)
and	)
ARKANSAS STATE HIGHWAY AND TRANSPORTATION DEPARTMENT	)
Defendants.	)

PLAINTIFFS' BRIEF IN RESPONSE TO DEFENDANTS' MOTIONS TO DISMISS

IV.(C). The Claims Commission System Violates Plaintiffs' Due Process Rights.

Defendants erroneously argue that the plaintiffs were provided with sufficient due process pursuant to Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), as defendants argue that the

mere potential that the Claims Commission's hearing might result in an award to a claimant establishes a sufficient remedy for due process purposes.

Defendants' arguments are contrary to the holdings of several Courts which have addressed these constitutional issues.

Georgia has a claims system in which a claimant against the State is limited by statute to a claim filed with the State Advisory Board, whose decisions are subject to review and approval by the State legislature pursuant to OCGA §28-5-60 et seq. and OCGA §28-5-80 et seq.

In Hight v. Burden, 350 S.E.2d 471 (Ga.App. 1986), the Georgia Court of Appeals considered this system and held that due process required that the plaintiff should be entitled to bring an action in Court against the State, even though the Georgia Constitution provides for sovereign

immunity and the Georgia statutes provide for legislative review of Board decisions. The Court held that Parratt v. Taylor, supra, and Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984) would not bar the Court's consideration of plaintiffs' claim against the State because "no adequate post deprivation remedy" was provided to the plaintiff in a system in which a State claims commission's decisions were subject to review and change by the State legislature. (Copies of OCGA §28-5-60 et seq, OCGA §28-5-80 et seq. and Hight, supra, are attached collectively as Exhibit 2).

The Court in Lambert v. McFarland, 612 F.Supp. 1252 (N.D. Ga. 1984) also considered this issue. Defendant City of Atlanta argued that even if the plaintiff's due process complaints were true, defendant should be entitled to summary judgment

pursuant to Parratt, supra, as adequate state remedies existed for the alleged deprivation.

The Court rejected defendant's Parratt argument because the City enjoyed immunity from liability pursuant to state law. The Court held:

> "The United States Supreme Court recognized this term in Hudson v. Palmer, ____ U.S. ___, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984), that consideration of state doctrines of immunity is relevant in determining the "adequacy" of state remedies. Where, as in the present case, the municipal corporation of the City of Atlanta is immune from suit in performing the governmental function of maintaining the jail, the court cannot conclude as a matter of law that adequate state remedies exist. Therefore, defendants' motion

for summary judgment on the Parratt question is DENIED."

(Id., at 1267-1268).

Arkansas likewise provides for inadequate post-deprivation remedies in violation of due process with its system of legislative review of Claims Commission decisions coupled with sovereign immunity. The Court in Bumgarner v. Bloodworth, 738 F.2d 966 (8th Cir. 1984) held that a due process claim would not be subject to dismissal, rejecting the argument that Arkansas provides adequate post-deprivation remedies. The Court stated that one of its reasons for concluding that Arkansas does not provide adequate post-deprivation remedies is that the Arkansas General Assembly must approve Claims Commission awards in excess of $2,000, and payment of such funds is conditioned on

appropriation of funds by the legislature. Id., at 968.

The Courts of several other states have held that due process requires the right of judicial review of an administrative decision, even if such judicial review is not provided by statute. State ex rel. State Tax Commission v. Luten, 459 S.W.2d 375, 376 (Mo. banc 1970); City of Hammond v. Red Top Trucking Co., Inc., 409 N.E.2d 655, 658 (Ind.App. 1980); Mathis v. Cooperative Vendors, Inc., 354 N.E.2d 269, 274 (Ind.App. 1976); Bloom v. Texas State Board of Examiners of Psychologists, 475 S.W.2d 374, 378 (Tex.App. 1972), reversed on other grounds, 492 S.W.2d 460 (1973); Graves v. Cogswell, 552 P.2d 224, 225 (Idaho 1976).

The Arkansas law also requires that due process must be fulfilled in a quasi-judicial proceeding such as the Claims

Commission's proceedings regarding plaintiffs' claims in this case. In McBride v. Daniels, 269 Ark. 705, 600 S.W.2d 425 (Ark.App. 1980), the Arkansas Court of Appeals held:

> "Due process alone dictates something more than a perfunctory consideration of one's request for a review of a decision in an adversary proceeding, and this is especially true where, as here, the claimant has economic rights at stake. While the proceedings below are termed administrative, they nonetheless entail quasi-judicial functions which must measure up to the standards of due process."
>
> (Id., at 426).

The Claims Commission's Order of November 20, 1988 fails to meet these standards of due process as the Commission's brief Order is no more than a "perfunctory consideration" of plaintiffs' claims.

Professor Rodney A. Smolla, in his article Politics and Due Process Don't Mix: Should the State Claims Commission Be Abolished?, 1986 Ark. L. Notes 43- (1986) concluded that the Arkansas legislature's power to influence decisions of the Claims Commission results in a violation of due process:

> "the Claims Commission approach to handling claims against the state is conceptually flawed. No matter how conscientious and able the men and women appointed to the Commission may be, they function in a setting inherently in tension with values of due process and economic efficiency."
> (Smolla, supra, at 44)

A copy of Professor Smolla's article is attached as Exhibit 3.

Professor Smolla explained how due process is violated by the Claims Commission's present structure:

> "The Claims Commission, because it is grounded in the doctrine of sovereign immunity, and because it is dependent on later legislative approval of all but noncontroversial small claims, does not in the final analysis dispense due process at all; instead it dispenses legislative grace. An Arkansan injured by his or her own state has no real legal rights at all, no real guarantee of genuine due process, but only the opportunity to petition the legislature for mercy, dispensed by its agent, the Commission.

* * * * *

We are all encouraged to engage in socially productive activity, but when something goes wrong through our fault, we are all expected to pay the freight.

Why should the state be different? On what intelligent moral, political, or legal principle can the state justify breaching its contract with citizens and laughing in their faces?

* * * * *

Under our current regime, there is no apparent <u>legal</u> remedy for the most egregious breach of contract, or the most gruesome life-depriving act. There is a remedy of sorts, but it is not legal, in the sense that it is not grounded in any enforceable mechanism resembling what we would normally consider the "operation of law." The citizen may take his or her "claim" for breach of contract or wrongful death to

the State Claims Commission. The Commission will set a date for the claim to be "adjudicated," and an adversarial hearing between the citizen's representative and the state's representative (from the Attorney General's Office) will indeed take place, governed by somewhat relaxed but nonetheless concrete rules of evidence and procedure. But despite these admirable elements of orderly resolution at the Commission level, no candid characterization of this procedure would label it a legal remedy. For if the Commission abuses its power, if it ignores the evidence, contravenes its own procedural rules, or operates out of irrational whim or caprice, there is nothing that can be done about it, save petitioning the General Assembly. And

from the opposite extreme, if the Commission allows the claim, and the legislature out of whim or caprice simply fails to abide by the Commission ruling and refuses to pay the claim, there is absolutely nothing the citizen can do. The appeal to the General Assembly is not worthless, of course. It does add something to the remedial structure, but what it adds is not what lawyers would call legal, but political. Water cannot rise higher than its source - the Commission exists at the will and pleasure of the legislature, and so do its rulings.

* * * * *

The Claims Commission acts merely as the legislature's grace-dispencing agent, with its decisions as to how the state's precious largess should be

distributed constantly subject to legislative countermand."

(Smolla, supra, at 50).

Professor Smolla's analysis is similar to that of the Court in Hight, supra, in which it was held that due process required that a claim against the State would have to be reviewed in Court despite the State law of sovereign immunity and despite a statutory scheme which provided for claims being filed with a state claims commission, to be reviewed by the State legislature.

In this case, the plaintiffs have alleged that the Claims Commission's Order of October 20, 1988 bears no relation to the pleadings or evidence adduced at the hearing. The Courts of other states which have considered such a situation have held that due process is violated.

In D'Acquisto v. Washington, 640 F.Supp. 594, 622 (N.D. Ill. 1986) the Court

held that an agency charged with making a decision should make an independent decision rather than automatically and uncritically accepting the view of an adversary. If the decision maker is under so much pressure from an adversary that in effect the decision maker and the adversary are the same person, due process is violated.

In Bunnell v. Industrial Commission of Utah, 740 P.2d 1331, 1333 (Utah 1987), the Supreme Court held that due process is violated when the appearance of unfairness is so plain that a reasonable person would find an administrative proceeding unfair.

In this case, the Claims Commission denied plaintiffs' claims in a brief order which is irrelevant to the pleadings and evidence. The appearance of unfairness establishes that due process has been violated.

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
Case No. 88-7241

FIREMAN'S INSURANCE COMPANY and D.H. BLATTNER & SONS, INC.,	)
Plaintiffs,	)
vs.	)
ARKANSAS STATE CLAIMS COMMISSION,	)
and	)
ARKANSAS STATE HIGHWAY AND TRANSPORTATION DEPARTMENT,	)
Defendants.	)

PETITION FOR REVIEW

* * * *

13. The Arkansas State Claims Commission's Order of October 20, 1988 violates statutory and constitutional provisions, was made in excess of the Commission's statutory authority, was made upon unlawful procedures, and was affected by other error, as the Commission failed to provide separate findings of fact and conclusions of law in its Order of October 20, 1988, as

required by A.C.A. §25-15-210(b)(2) and Amendments 5 and 14 of the United States Constitution.

14. The Arkansas State Claims Commission's Order of October 20, 1988 was not supported by substantial evidence of record as the Order, which denied and dismissed the claims of Fireman's and Blattner, was not supported by adequate evidence to justify total denial and dismissal of the claims. The Order is particularly lacking in a substantial evidentiary basis when it is considered that the testimony and exhibits presented by Fireman's and Blattner in support of their claims were not disputed in any significant way by any contrary evidence by the Arkansas Highway Commission.

15. The Arkansas State Claims Commission's Order of October 20, 1988 was affected by error of law as only a single

irrelevant reason was given in the Order for the denial and dismissal of the claims of Fireman's and Blattner, that "Claimant failed to prove any improper action on the part of Arkansas State Highway Department." "Improper action" is not an element of, and is irrelevant to, the legal theories pled and argued by Fireman's and Blattner, which include breach of contract, negligence, contractual interference and misrepresentation (ex contractu breach of warranty).

16. The Arkansas State Claims Commission's Order of October 20, 1988 is arbitrary, capricious and characterized by abuse of discretion as the Order lacks rational basis and is grounded on a finding of fact arising from an erroneous view of the law. The Order gives only one reason for the denial and dismissal of the claims of Fireman's and Blattner, that "Claimant

failed to prove any improper action on the part of Arkansas State Highway Department." This finding of fact, that no "improper action" was proved, is based on an erroneous view of the law as "improper action" is not an element of, and is irrelevant to the legal theories pled and argued by Fireman's and Blattner, which include breach of contract, negligence, contractual interference and misrepresentation (ex contractu breach of warranty). The Order contains no rational basis which could relate to the theories pled and argued by Fireman's and Blattner.

17. The Arkansas State Claims Commission's Order of October 20, 1988 violates constitutional and statutory provisions, was made in excess of the Commission's statutory authority, was made upon unlawful procedure and is affected by other error as the Commission violated Article IV, Sec. 1

of the Arkansas State Constitution in issuing said Order by impermissibly exercising judicial, executive and legislative powers to the exclusion of the judicial branch of the Arkansas State government.

18. As the result of the Arkansas Claims Commission's violations and omissions, as set forth above, Fireman's and Blattner were prejudiced and denied their constitutional rights to fundamental fairness and due process of law, as well as their rights under Arkansas law.

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
Case No. 88-7251

FIREMAN'S INSURANCE COMPANY and D.H. BLATTNER & SONS, INC.,	)
Plaintiffs,	)
vs.	)
ARKANSAS STATE CLAIMS COMMISSION,	)
and	)
ARKANSAS STATE HIGHWAY AND TRANSPORTATION DEPARTMENT,	)
Defendants.	)

PETITION FOR WRIT OF CERTIORARI

* * * *

12. The Commission's Order of October 20, 1988 is erroneous on its face, is contrary to Arkansas law, was made in excess of the Commission's authority as shown on its face, and violates constitutional provisions as the Commission failed to provide separate findings of fact and conclusions of law in its Order of October 20, 1988, as required by A.C.A. §25-15-210(b)(2) and

Amendments 5 and 14 of the United States Constitution.

13. The Commission's Order of October 20, 1988 is erroneous on its face and contains errors of law as only a single irrelevant reason was given in the Order for the denial and dismissal of the claims of Fireman's and Blattner, that "Claimant failed to prove any improper action on the part of Arkansas State Highway Department." "Improper action" is not an element of, and is irrelevant to, the legal theories pled and argued by Fireman's and Blattner, which include breach of contract, negligence, contractual interference and misrepresentation (ex contractu breach of warranty).

14. The Commission's Order of October 20, 1988 contains errors of law, as the Order was not supported by substantial evidence of record as the Order, which denied and dismissed the claims of

Fireman's and Blattner, was not supported by adequate evidence to justify total denial and dismissal of the claims. The Order is particularly lacking in a substantial evidentiary basis when it is considered that the testimony and exhibits presented by Fireman's and Blattner in support of their claims were not disputed in any significant way by any contrary evidence by the Arkansas Highway Commission.

15. The Commission's Order of October 20, 1988 violates constitutional and statutory provisions, was made in excess of the Commission's statutory authority, was made upon unlawful procedure and is affected by other error as the Commission, a quasi-judicial body, violated Article IV, Sec. 1 of the Arkansas State Constitution in issuing said Order by impermissibly exercising judicial, executive and legislative powers to the exclusion of the judicial branch of the Arkansas State government.

16. As a result of the Arkansas Claims Commission's violations and omissions, as set forth above, Fireman's and Blattner were prejudiced and denied their constitutional rights to fundamental fairness and due process of law as well as their rights under Arkansas law.

Supreme Court, U.S.
FILED
JUL 24 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-2025

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

FIREMAN'S INSURANCE COMPANY AND
D. H. BLATTNER & SONS, INC. ..... *Petitioners,*

vs.

ARKANSAS STATE CLAIMS COMMISSION AND
ARKANSAS STATE HIGHWAY AND
TRANSPORTATION DEPARTMENT. ..... *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

RESPONDENT'S BRIEF IN OPPOSITION

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ARKANSAS LEGISLATIVE DIGEST, INC

EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

I.

THE ARKANSAS STATE CLAIMS COMMISSION SYSTEM DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT SINCE IT PROVIDES CLAIMANTS WITH AN ADEQUATE POST-DEPRIVATION REMEDY.

II.

THE ARKANSAS STATE CLAIMS COMMISSION SYSTEM PROVIDES CLAIMANTS WITH AN OPPORTUNITY TO BE HEARD IN A MEANINGFUL MANNER IN ACCORDANCE WITH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

LIST OF PARTIES

Petitioners are foreign corporations authorized to do business in the State of Arkansas, namely, Fireman's Insurance Company, a New Jersey corporation and surety on Arkansas State Highway and Transportation Department projects that are the subject of this litigation, and D. H. Blattner & Sons, Inc., which is a Minnesota corporation, and is the completing contractor for the surety.

Respondents are the Arkansas State Claims Commission, an arm of the Arkansas Legislature authorized to determine claims against the State of Arkansas, and the Arkansas State Highway and Transportation Department, an agency of the State of Arkansas and obligee on the subject bond contracts which named Fireman's Insurance Company as the surety.

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RULES AND REGULATIONS OF THE ARKANSAS STATE CLAIMS COMMISSION

Appeal of Commission's Decision A-2

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No. 89-2025

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

FIREMAN'S INSURANCE COMPANY AND
D. H. BLATTNER & SONS, INC., ... *Petitioners,*

vs.

ARKANSAS STATE CLAIMS COMMISSION AND
ARKANSAS STATE HIGHWAY AND
TRANSPORTATION DEPARTMENT, ... *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The pertinent opinions below are included in the Petitioners' Appendix. The opinion of the Arkansas Supreme Court, affirming the Pulaski County Circuit Court, is also included in the Petitioners' Appendix, Pages 1-16.

The judgment of the Arkansas Supreme Court was entered on February 26, 1990. A Petition for Rehearing was denied on March 26, 1990.

JURISDICTION

The respondent, Arkansas State Highway and Transportation Department, asserts that the petitioners have failed to allege a constitutional violation invoking the jurisdiction of this Court since the Arkansas State Claims Commission system provides the petitioners with an adequate post-deprivation remedy.

STATEMENT OF THE CASE

This action commenced as a claim filed by the petitioners in the Arkansas State Claims Commission with jurisdiction based on Article 16, §2 of the Constitution of Arkansas and Ark. Code Ann. §19-10-204(a) which provides that the Arkansas State Claims Commission shall have exclusive jurisdiction over all claims against the State of Arkansas. (Appendix A-1)

Petitioner, Fireman's Insurance Company, provided performance bonds on two highway construction projects naming the petitioner as surety and the respondent, Arkansas State Highway Commission as obligee. The original contractors on the highway projects defaulted and Fireman's Insurance Company retained petitioner, D. H. Blattner & Sons, as the completion contractor. During the completion of the contracts many disputes arose between the petitioners and respondent, Arkansas State Highway Commission, which culminated in a claim in the Arkansas State Claims Commission by petitioners based upon breach of contract, misrepresentation, negligence and contract interference.

Pursuant to the rules and regulations of the Arkansas State Claims Commission, the respondents were afforded a hearing wherein they presented sworn testimony and other evidence in support of their claim, and were allowed to cross-examine witnesses produced by the respondent. A complete transcript of this hearing was made and preserved. The respondent, Arkansas State Claims Commission, issued a written order finding that the petitioners failed to prove any improper action on the part of the respondent, Arkansas State Highway and Transportation Department, and, therefore, unanimously denied and dismissed petitioners' claim.

Although the rules and regulations provide that an appeal to the Arkansas General Assembly may be taken from a decision of the Arkansas State Claims Commission, the petitioners chose to file for review to the Circuit Court of Pulaski County under the Administrative Procedure Act and subsequently sought an additional remedy by filing a petition for a Writ of Certiorari in Pulaski Circuit Court. The respondents moved to dismiss the petition and appeal based upon the defenses of lack of subject matter jurisdiction, exclusiveness of the remedy provided by the Arkansas State Claims Commission, doctrine of sovereign immunity, and that the procedure of the Arkansas State Claims Commission satisfied the Fourteenth Amendment of the United States Constitution. After a hearing, the Circuit Court granted the respondents' motion to dismiss and denied the petition for writ of certiorari.

From this order, the petitioners appealed to the Arkansas Supreme Court, which affirmed the Circuit Court's order. The Arkansas Supreme Court specifically found that the sovereign immunity granted by Article 5 §20 of the Constitution of the State of Arkansas barred an action against the respondents; that the procedure for hearing claims in the Arkansas State Claims Commission satisfied the due process requirements of the Constitution, and that the petitioners had failed to exhaust their procedural remedy of an appeal to the Arkansas General Assembly, and, therefore, lacked standing to raise a denial of due process.

Petitioners' Petition for Rehearing was denied on March 26, 1990 by the Arkansas Supreme Court.

Although the State of Arkansas cannot be sued as a defendant for monetary damages in any of her courts, a claimant may file a cause of action in the Arkansas State

Claims Commission and obtain monetary damages. Claimants following said procedure are entitled to a public hearing conducted in a fair and impartial manner, giving the claimant the full opportunity to present evidence, cross-examine witnesses, and present arguments as provided by Ark. Code Ann. §19-10-210. The Commission is also required to adopt the procedure used by the Arkansas Chancery Courts to the extent practicable, and its hearings are required to be conducted in a judicial manner. (Appendix A-2). If a claimant is dissatisfied with the decision of the Arkansas State Claims Commission he has the right to appeal to the Arkansas General Assembly. (Appendix A-2). In the case herein, the petitioners did not avail themselves of this remedy.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should be denied because the decision by the Arkansas Supreme Court in this matter does not conflict with the decisions of State and Federal Courts. The petitioners seek a review of the decision of the Arkansas Supreme Court in this case. Although the petitioners were denied access to the State courts (by virtue of the State's sovereign immunity, Article 5 §20 Arkansas Constitution) to seek damages against the Highway Department allegedly arising from breaches of contracts, the Arkansas Supreme Court in this case held that the petitioners were afforded an adequate post-deprivation remedy by being allowed to file their claim for damages against the Highway Department in the Arkansas State Claims Commission.

The petitioners argue that by virtue of the lack of a judicial review of their claim for damages that they are denied due process. The Arkansas State Highway and Transportation Department, on the other hand, contends that the remedy provided in the Arkansas State Claims Commission is constitutionally sound as a post-deprivation remedy. Under Ark. Code Ann. §19-10-210, a claimant in the Arkansas State Claims Commission is entitled to a public hearing conducted in a fair and impartial manner, is entitled to a full opportunity to present evidence, to cross-examine witnesses, and present arguments. Under said code provision, to the extent practicable, the Commission is required to adopt the procedure used by the Arkansas Chancery Courts, and its hearings are required to be conducted in a judicial manner.

Under the regulations of the Arkansas State Claims Commission, a claimant is entitled to appeal an adverse

ruling to the Arkansas General Assembly. The petitioners in this case did not do so. Therefore, the claimants respectfully submit that due to their failure to appeal to the General Assembly, they have no standing to challenge the adequacy of the Arkansas State Claims Commission as a post-deprivation remedy and that they cannot allege a denial of due process.

ARGUMENT

I.

THE ARKANSAS STATE CLAIMS COMMISSION SYSTEM DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT SINCE IT POVIDES CLAIMANTS WITH AN ADEQUATE POST-DEPRIVATION REMEDY.

The petitioners allege that the Arkansas State Claims Commission system violates the Due Process Clause of the Fourteenth Amendment. Strangely enough the petitioners cite *Parratt v. Taylor*, 451 U.S. 527 (1981) in support of its contention that the Arkansas Supreme Court's ruling in *Fireman's Ins. Co. v. Arkansas State Claims Commission*, 301 Ark. 451 (1990), is in conflict with the decisions of the U.S. Supreme Court regarding adequate post-deprivation remedies. An analysis of *Parratt v. Taylor, Supra*, shows otherwise.

In that case, an inmate at the Nebraska Penal and Correctional Complex ordered by mail hobby materials valued at $23.50. These materials were lost presumably by the Nebraska Prison's negligence. The inmate alleged that the negligence on the part of the prison deprived him of his property without due process of law. The District Court entered summary judgment for the inmate holding that negligent actions by State officials can be a basis for an action under 42 U.S.C. §1983. This ruling was affirmed by the Court of Appeals. The U.S. Supreme Court granted certiorari and reversed the judgment of the Court of Appeals.

This Court noted that the inmate chose to proceed under §1983 in spite of the fact that the State of Nebraska had a tort claims procedure which provided a remedy to persons who suffered tortious losses at the hands of the State. In this Court's opinion in *Parratt, Supra*, at 537, it was stated that we "must decide whether the tort remedies which the State of Nebraska provides as a means of redress for property deprivations satisfy the requirements of procedural due process." In concluding that the Nebraska post-deprivation remedy provided procedural due process, Justice Rehnquist opined that "the impracticality of providing any meaningful pre-deprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking can satisfy the requirements of procedural due process." *Parratt, Supra*, at 539.

In this instance, the alleged cause of action arose from the performance of a highway construction contract project where the initial contractor had defaulted, and the surety, Fireman's Insurance Company, and D. H. Blattner and Sons, Inc., had stepped in to complete the construction project as contracted by the original contractor. If a cause of action arose from the alleged breaches of contracts, negligence, and interferences by the Highway Department, there would be no way to anticipate the alleged extent of injury suffered by the petitioners until after the completion of the project. Thus, the propriety of a post-deprivation remedy is axiomatic.

Justice Rehnquist also reasoned that the extent of the remedy in comparison with that of a federal remedy does not in and of itself dictate whether the State remedy is adequate.

He stated:

> Although the state remedies may not provide the respondent with all the relief which may have been available if he could have proceeded under §1983, that does not mean that the state remedies are not adequate to satisfy the requirements of due process.

Parratt v. Taylor, Supra, at 544.

This reasoning was followed in *Hudson v. Palmer*, 468 U.S. 517, 533 (1984), where it was held "that an unauthorized intentional deprivation of property by a State employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful post-deprivation remedy for the loss is available.

In spite of this Court's rulings in *Parratt v. Taylor* and *Hudson v. Palmer*, which are consistent with the ruling in the case at hand, the petitioners have cited several other cases that allegedly support their position that the Arkansas State Claims Commission system is not an adequate post-deprivation remedy. These cases can be easily distinguished from this case.

For instance, *Bumgarner v. Bloodworth*, 738 F.2d 966 (8th Cir. 1984), is wholly inapplicable. In that case, the plaintiff brought a §1983 action seeking declaratory and injunctive relief, damages, and the return of certain property seized during a search of the plaintiff's house. The Court of Appeals in *Bumgarner v. Bloodworth, Supra*, at 968 held that the Arkansas State Claims Commission was

not empowered to grant the plaintiff adequate relief, stating:

> Only the claims against the State Trooper is subject to the jurisdiction of the Claims Commission and since the Commission can make only monetary awards, even a judgment in plaintiff's favor against the Trooper would not give the plaintiff the relief he seeks, return of certain property.

Here, the petitioners, Fireman's Insurance Company and D. H. Blattner and Sons, Inc., are seeking *only* monetary damages. Therefore, the Arkansas State Claims Commission *is* empowered to grant adequate and full relief to the petitioners unlike the Court in *Bumgarner, Supra*, which could only grant partial relief.

Another case cited by the petitioners is *Birkenholz v. Sluyter*, 857 F.2d 1214 (8th Cir. 1988). The plaintiff, Pamela Birkenholz, who was the Director of Nursing at a private mental health facility licensed by the Department of Mental Health, filed a complaint alleging that the defendants violated her procedural due process rights when they found her guilty of neglect of mental health patients without giving her an opportunity for a hearing.

An examination of the facts in this case revealed that an investigation resulted in a finding that Pamela Birkenholz was guilty of failure to provide reasonable and necessary services to her clients. No notice of the allegations was presented to her, nor was an opportunity for a hearing provided prior to the decision of the Missouri Department of Mental Health being entered. Subsequently, Birkenholz was fired by the mental health facility. Thereafter, Birkenholz filed a §1983 action against her employer and the Depart-

ment of Mental Health officials alleging that they had violated her procedural due process rights by finding her guilty of neglect without a hearing. In her complaint, she sought compensatory and punitive damages and reinstatement to her former position. In response, the defendants filed a Motion to Dismiss contending that they were entitled to qualified immunity. This motion was denied by the District Court.

On appeal, the Eighth Circuit Court of Appeals held that even though Birkenholz was dismissed from her employment without notice and without an opportunity for a hearing prior to the termination of her job, that a *de novo* post-deprivation evidentiary hearing before a Missouri Circuit Court satisfied the due process requirements. Thus, although this case is relied upon by the petitioners, in reality it is supportive of the respondent's position that the post-deprivation remedy provided by Arkansas State Claims Commission is adequate "due process."

Also cited by the petitioners is *Lambert v. McFarland*, 612 F. Supp. 1252 (D.C. Ga. 1984). In that case, the plaintiff filed a §1983 action alleging, among other things, that the physical conditions in the Atlanta City Jail were such that his Fourteenth Amendment right to not be deprived of life, liberty, or property without due process was violated. The defendants, citing *Parratt v. Taylor*, 451 U.S. 527 (1981), moved for summary judgment arguing that in order for the Court to find that there had been a deprivation of due process, it must determine that there was no adequate State remedy for the plaintiff. The plaintiff countered the defendant's argument stating that he had no adequate State law remedy against the City of Atlanta because the Official Code of Georgia, §36-33-3, provides that "a municipal corporation shall not be liable for the torts of policemen or

other officers engaged in the discharge of duties imposed on them by law." Upon consideration of the defendants' Motion for Summary Judgment, the District Court of Georgia concluded that the defendant City was not entitled to said motion since the municipality was immune from liability with respect to the maintenance of a jail because it is considered a "governmental function" as opposed to a "ministerial duty." Because the City of Atlanta was immune from suit in performing the "governmental function" of maintaining the jail, the Court decided that it could not conclude as a matter of law that adequate State remedies were in existence. Therefore, the defendants' Motion for Summary Judgment was denied. However, the Court noted that according to Georgia law liability for negligence is imposed on officers and public employees when the acts in question are of a ministerial nature.

Ultimately, the Georgia District Court in *Lambert* ruled that given the state of the record that was before it, it could not rule that as a matter of law that adequate State remedies were in existence. More specifically, the Court stated that there must be a determination if the intent of the jail conditions was to punish. For if the conditions were a manifestation of an intent to punish, then the Constitution would prohibit such conditions. Without a sufficient record, the Court said it was unable to grant the defendants' Motion for Summary Judgment. Therefore, it is submitted that *Lambert v. McFarland* is not supportive of the petitioners' position as they allege. Rather, the fact that the Court stated that it must make a determination of whether a post-deprivation remedy was available in order to determine if due process had been denied the plaintiff strengthens the respondent's argument that the petitioners were not denied due process in this case.

While the petitioners cite yet another case, *Hight v. Burden*, 350 S.E. 2d 471 (Ga. App. 1986), which held that the post-deprivation remedy provided under Georgia law did not provide due process under *Parratt* and *Hudson*, the respondent submits that the opinion in that case is not persuasive nor is it binding on the Arkansas Supreme Court. There are in fact two federal cases from Arkansas that deal with the adequacy of the Arkansas State Claims Commission procedure in relation to the Due Process Clause of the Fourteenth Amendment.

In *Steffen v. Housewright*, 665 F.2d 245 (8th Cir. 1981), an inmate housed in the Cummins Unit of the Arkansas Department of Correction brought a §1983 action against the Director of the Arkansas Department of Correction and other officials for certain property belonging to him valued at $882.70 that had been stolen, lost or misplaced. Prior to filing the §1983 action, Steffen filed a claim in the Arkansas Claims Commission seeking compensation for the property. The Claims Commission awarded him $200.00. Steffen filed his §1983 action in the U.S. District Court where the defendants' Motions to Dismiss were granted. On appeal the Eighth Circuit Court of Appeals held that although Steffen was deprived of property belonging to him, he was not deprived of said property without due process of law since he had an adequate post-deprivation remedy in the Arkansas State Claims Commission.

In *Light v. Blackwell*, 472 F. Supp. 333 (E.D. Ark. 1979), the plaintiffs filed a §1983 action for the taking of their property without just compensation, and for the continuing torts of trespass, maintenance of a nuisance and unreasonably depriving the plaintiffs of natural lateral support to their property. In the defendants' Motion to Dismiss they alleged that the plaintiffs had failed to state a constitutional

violation invoking jurisdiction under 42 U.S.C. §1983. Upon consideration of the defendants' contention, the U.S. District Court of Arkansas agreed with the defendants and held that the State Claims Commission satisfied the constitutional requirement of due process and that it was readily available to the plaintiffs. Quoting from the opinion in *Bonner v. Coughlin*, 517 F.2d 1311 (7th Cir. 1975) it was stated:

> This is not to suggest that the plaintiff in a §1983 action must exhaust his state remedies before seeking federal relief. Rather, it seems to us that the availability of an adequate state remedy for a simple property damage claim avoids any constitutional violation. This result is entirely consistent with the basic statutory purposes as explained in *Monroe v. Pape*. There is simply no need to provide a federal tort remedy for property damage caused by the negligence of state agents if a state remedy is not only adequate in theory but also readily available in practice.

Light v. Blackwell, *Supra*, at 338.

Making reference to three other cases, the petitioners argue that it was not necessary for them to appeal the Arkansas State Claims Commission decision to the Arkansas General Assembly for a review of the Commission's decision. The first case they cite is *Honig v. Doe*, 484 U.S. 305 (1988). In *Honig*, *Supra*, this Court dealt with the unilateral action of a school administration relating to the removal of a disabled child from a school system as a consequence of certain dangerous conduct that he had exhibited. The legal issue involved in that case was whether the disabled child had to exhaust all of his available administrative remedies before seeking judicial relief.

In *Honig*, it was recognized that in cases where exhaustion of all administrative remedies would be futile either as a "legal or practical matter," that it would be proper to seek an injunction in federal court restraining the school administration from taking unilateral action in removing a disabled child from the school system. The rationale in this opinion was based on the realization that the administrative procedures, that would have been entailed in challenging the school administration's decision, would have been too ponderous and lengthy to afford an effective remedy. Although the petitioners cite *Honig* in support of their argument, they made no showing that an appeal to the Arkansas General Assembly would be of a similar nature to the administrative remedies that were available in *Honig*.

Oddly enough, the petitioners cite *Barr v. Ark. Blue Cross and Blue Shield*, 297 Ark. 262 (1988) for the proposition that a party need not exhaust all administrative remedies. Yet, the ruling in that case was that the appellant failed to establish the circumstances that would relieve them from first pursuing their administrative remedies under the Federal Employees Health Benefit Act.

Arkla Exploration Company v. Texas Oil and Gas Corporation, 734 F.2d 347 (8th Cir. 1984), which is also relied upon by the petitioners, allegedly concerns the doctrine of exhaustion of administrative remedies. The respondent asserts that this case actually concerns the leasing of federal lands and the question of mootness. Under federal law, before government lands may be leased for oil or gas exploration without competitive bidding, the Secretary of the Interior must determine that the lands are not within a "known geological structure of a producing oil or gas field" (KGS). The issue in *Arkla, Supra*, concerned whether the Secretary made a proper KGS determination before granting

oil and gas exploration leases to Texas Oil and Gas Corporation on a non-competitive basis. Upon learning of these leases, Arkla filed an administrative protest against the issuance of the leases to Texas Oil and Gas Corporation. Three days after Arkla had filed its protest, the Secretary of the Interior ordered a reevaluation of the land leased to Texas Oil and Gas Corporation which resulted in the invalidation of said leases. Consequently, the protest filed by Arkla was dismissed as moot.

Therefore, none of the cases cited by the petitioners with respect to the doctrine of exhaustion of administrative remedies are relevant. It is, therefore, the respondents' position that the petitioners should have availed themselves of the opportunity to appeal to the Arkansas General Assembly and that they have been afforded due process.

II.

THE ARKANSAS STATE CLAIMS COMMISSION SYSTEM PROVIDES CLAIMANTS WITH AN OPPORTUNITY TO BE HEARD IN A MEANINGFUL MANNER IN ACCORDANCE WITH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Mathews v. Eldridge, 424 U.S. 319 (1976), is cited by the petitioners as authority for their contention that the Arkansas Claims Commission system violates the due process requirements of fundamental fairness. The petitioners allege that they were not given an opportunity to be heard "in a meaningful manner" since the Claims Com-

mission is not independent from the General Assembly. The Arkansas State Highway and Transportation Department respectfully submits that the petitioners have misconstrued the opinion in *Mathews v. Eldridge*. In that case, which involved the termination of Social Security disability benefit payments to a recipient without prior notice, this Court held that something less than an evidentiary hearing is sufficient prior to the entry of an adverse administrative action terminating disability benefits. In analyzing the procedural safeguards that were in place in *Mathews v. Eldridge*, this Court quoted approvingly from *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) saying:

> [D]ue process is flexible and calls for such procedural protections as the particular situation demands.

The Arkansas State Highway and Transportation Department respectfully submits that consideration of "the particular situation" of the facts in this case must not be ignored. Here, it was not an action on the part of the Highway Department that brought on this litigation. Rather, it was the breach of contract by the original contractor who had voluntarily entered into a contract with the Highway Department after it had analyzed the job specifications called for under the contract and had submitted an itemized bid for the construction project. After the original contractor had begun work on the project it defaulted because of its own inability to fulfill its contractual obligations. At that point the surety, Fireman's Insurance Company, and the second contractor, D. H. Blattner and Sons, Inc., stepped into the shoes of the original contractor and fulfilled the remainder of the contract.

In challenging the Arkansas State Claims Commission

system as being fundamentally unfair because of its lack of procedural guidelines, the petitioners cite two recent U.S. Supreme Court cases. They maintain, without foundation, that the State's interest in having a Claims Commission procedure is premised on the interest of the State in limiting the amount of monetary damages awarded against it by claimants seeking damages against the State of Arkansas. In setting forth this argument, the petitioners contend that this Court has rejected the premise that an adverse pecuniary impact on a State's economy is sufficient to justify a violation of procedural due process, citing *Ake v. Oklahoma*, 470 U.S. 68 (1985).

It is respectfully submitted that the petitioners' reliance on *Ake v. Oklahoma, Supra*, is misplaced. In that case this Court considered "whether the Constitution requires that an indigent defendant have access to the psychiatric examination and assistance necessary to prepare an effective defense based on his emotional condition, when his sanity at the time of the offense is seriously in question." *Ake v. Oklahoma*, at 70. The facts in that case are totally dissimilar from the case at hand.

In *Ake* the central issue revolved around the right of an indigent criminal defendant to be afforded a psychiatrist when his defense is based on a plea of insanity. This Court concluded that to deny the defendant access to a psychiatrist would deny him "the raw materials integral to the building of an effective defense." *Ake v. Oklahoma* at 77. This Court also held that the State of Oklahoma's interest in preventing a staggering financial burden, which the State anticipated if it were required to provide a competent psychiatrist for each indigent defendant, was not a compelling interest on the part of the State to justify the preclusion of the State providing a defendant with a competent psychiatrist. From

that case, the petitioners attempt to apply its rationale to the factual circumstances of this case.

The respondent submits that any analogy between *Ake* and this case is totally without merit. One, the petitioners are assuming without citing any authority whatsoever that the purpose of the Claims Commission system is to limit the financial responsibility of the State. Two, the availability of a psychiatrist for a defendant in the presentation of a criminal proceeding goes to the heart of the defense of a defendant claiming insanity at the time of the commission of a crime. Whereas, the lack of a judicial review of a decision rendered by the Arkansas Claims Commission does not inhibit in any way a claimants' presentation of their cause of action.

In this case, *Fireman's Insurance Co. v. Arkansas State Claims Commission*, 301 Ark. 451 (1990), the petitioners filed their complaint, and they were afforded an opportunity to prove their claim. A complete transcript of the hearing was made and preserved and a written Order was entered by the Claims Commission denying the petitioners' claim. All of which is in accordance with Ark. Code Ann. §19-10-210(b)(1) and (2), which provide:

> (b)(1) In conducting hearings, the commission shall not be bound by the formal rules of evidence and shall conduct all hearings publicly and in a fair and impartial manner, giving the parties full opportunity for presentation of evidence, cross-examination of witnesses, and argument.
>
> (2) To the extent practicable, the commission shall adopt the procedure used by the Arkansas chancery courts, and its hearing shall be conducted in a judicial manner.

All of this is well within the "due process" procedural requirements as interpreted by this Court. In *Washington v. Harper*, 494 U.S. ____, 110 S.Ct. 1028 (1990), it was stated that the Due Process Clause "has never been thought to require that the neutral and detached trier of fact be law trained or a judicial or administrative officer." *Parham* 442 U.S. 584, 607 (1979).

The petitioners also cite *Washington v. Harper, Supra*, vainly attempting to apply the holding in said case to the facts presented in this matter. These two factual and legal settings are completely inapposite. On the one hand in *Washington v. Harper*, the primary issue involved the procedural safeguards that were required by the State prior to treating a mentally ill prisoner with anti-psychotic drugs against his will. The contractual dispute between the parties at hand in no way measures up to the personal invasion by the State into the mind of a prisoner for the purpose of altering his very essence — his thought processes. A further distinction is that the petitioners can be made whole with an award of monetary damages after the fact; whereas, a person being treated with anti-psychotic drugs may be altered irrevocably by the taking of these drugs. Consequently, some type of pre-deprivation remedy is necessary prior to administering mind altering drugs.

A large portion of the petitioners' second point of argument is devoted to the amount of discretion that the Arkansas General Assembly has in reviewing a decision of the Claims Commission. The thrust of their argument is that the General Assembly's authority is so broad that it renders the Arkansas State Claims Commission system inadequate. The respondent respectfully submits that under *Parratt, Supra*, the Arkansas State Claims Commission system satisfies the test of an **adequate** post-deprivation

remedy. Furthermore, the two Arkansas federal court cases cited earlier, *Light v. Blackwell, Supra*, and *Steffen v. Housewright, Supra*, have held that the Arkansas State Claims Commission procedure does not violate the Fourteenth Amendment.

Therefore, the respondent submits that the additional remedy or recourse that the petitioners could have sought, by appealing to the Arkansas General Assembly, does not in any way diminish from the procedural safeguards that are available to any potential claimant who wishes to file a claim against the State of Arkansas. We submit that if the first bite of the apple, i.e. the Arkansas Claims Commission system, satisfies the due process requirements, that the fact that a second procedural remedy is in existence cannot nullify the "due process" that has already been afforded the petitioners. This is particularly true in this case since the petitioners did not even seek an appeal to the General Assembly. For without availing themselves of that remedy, the petitioners, the respondents, and this Court will never know if they would have been awarded the damages that they sought in the Claims Commission. Having not exhausted all the remedies available to them, they cannot be heard to complain that they were denied due process.

CONCLUSION

For these reasons, the petitioners' Petition for Writ of Certiorari should be denied.

Respectfully submitted.

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United States Constitution, Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Arkansas Constitution, Article 5, §20

The State of Arkansas shall never be made defendant in any of her courts.

Arkansas Constitution, Article 16, §2

The General Assembly shall from time to time provide for the payment of all just and legal debts of the State.

Ark. Code Ann. §19-10-204

(a) Except as otherwise provided by law, the Arkansas State Claims Commission shall have exclusive jurisdiction over all claims against the State of Arkansas and its several agencies, departments, and institutions but shall have no jurisdiction of claims against municipalities, counties, school districts, or any other political subdivisions of the state.

(b) The commission shall have no jurisdiction of, or authority with respect to, claims arising under the Workers' Compensation Act, Employment Security Act, Teacher Retirement Act, Public Employees Retirement Act, State

Police Retirement Act, or under laws providing for old age assistance grants, child welfare grants, blind pensions, or any laws of a similar nature.

Ark. Code Ann. §19-10-210

(a) The Director of the Arkansas State Claims Commission shall notify each claimant and also the head of each state agency, department, or institution against which a claim is filed of the time and place set for the hearing thereof.

(b)(1) In conducting hearings, the commission shall not be bound by the formal rules of evidence and shall conduct all hearings publicly and in a fair and impartial manner, giving the parties full opportunity for presentation of evidence, cross-examination of witnesses, and argument.

(2) To the extent practicable, the commission shall adopt the procedure used by the Arkansas chancery courts, and its hearing shall be conduted in a judicial manner.

RULES AND REGULATIONS OF THE ARKANSAS CLAIMS COMMISSION

APPEAL OF COMMISSION'S DECISION

The only appeal from the Claims Commission is to the Arkansas General Assembly. As an arm of the state legislature, the Commission's findings and decisions are subject only to review by the General Assembly as to awarding monetary damages. A final and binding decision of the Commission can only be appealed to the General Assembly to be reversed, amended or overturned.

HEARINGS

Rule 4.1 How Hearings Are to Be Conducted

The Commission, while not bound by the formal rules of evidence as stated in ARK. STAT. Ann. 13-1401, has adopted where applicable the procedure used by the Arkansas Chancery Courts and its hearings shall be conducted in a judicial nature.

Because the Commission is a fact-finding body for the General Assembly, the simplification and defining of the issues in question before the Commission is encouraged prior to hearing. The propriety of prior mutual exchange of testimony, exhibits or such matters that may be stipulated for the purpose of clarification, amplification or limitation is strongly encouraged.

Rule 4.2 Pre-hearing Conferences

If the interested parties prior to the hearing of a claim on the merits are unable to agree upon the facts or issues or cannot stipulate the questions of fact in issue, the Commission will arrange a pre-hearing conference to rule upon Motions pending or determine the evidential value to assist the parties in determining the factual basis of a claim.

Rule 4.3 Appearances

Any individual may appear for himself in his own behalf or have his claim presented by counsel, duly admitted as such to practice law in the State of Arkansas.

Any individual who elects to represent himself without the aid of counsel shall be held accountable in the same manner, and to the same degree, as qualified counsel entitled to practice before the Commission.

Rule 4.4 Witness Examination, Order of Procedure

Witnesses will be orally examined under oath before the commission unless their testimony is taken by deposition. The procedure of direct and cross-examination of a witness shall be the same as in courts of law and equity unless the Commission directs otherwise. After questioning under direct and cross-examination, the Commission members may question the witness to ascertain any points or facts.

The order of presentation may be varied by the Commission Chair, who may designate the order of witness presentation in any type of proceeding.